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No. 71-838

In the Supreme Court of the United States

October Term, 1971

Supreme Court, U.S.
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PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM AND MICHAEL PADEV,
Appellants,

v.

WADE CHURCH,
Appellee.

On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

JURISDICTIONAL STATEMENT

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No. .....

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On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment (written order) of the Superior Court of the State of Arizona, in and for the County of Maricopa, denying appellants' motion to vacate the verdict of a jury and the judgment entered thereon awarding damages against all appellants in a civil libel damage action in the sum of $250,000 actual damages and $235,000 punitive damages, and also appeal from an order of the Supreme Court of the State of Arizona refusing to review and vacate said Superior

Court order. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The judgment and orders from which this appeal is taken are not reported. The judgment and orders complained of are found in Appendix. The opinion of the Supreme Court of Arizona rendered on the appeal of this same claim following the first trial of the claim in 1963, resulting in a reversal for a new trial by a divided court is reported at 103 Ariz. 582, 447 P.2d 840 and is reproduced in Appendix, pages 5 to 52. Denial of certiorari by this Court following the Arizona Supreme Court ruling, supra, is reported at 394 U.S. 959.

JURISDICTION

The Superior Court order denying appellants' Motion for Judgment n.o.v. made with respect to the jury verdict and the judgment entered thereon in favor of appellee on the retrial of this action in the aggregate sum of $485,000 was entered October 8, 1971, and the order of the Arizona Supreme Court refusing to again review the evidence and independently judicially test the adequacy of the evidence to meet *New York Times Co. v. Sullivan*, 376 U.S. 254 standards for proof of "actual malice" in a civil libel damage action was entered November 16, 1971. The judgment of the Maricopa County Superior Court to which appellants' Motion for Judgment n.o.v. was directed was entered June 21, 1971. The Motion for Judgment n.o.v. was filed June 30, 1971 and was timely filed. These orders and this judgment are not reported. They are reproduced in Appendix.

The first trial of this claim was held in 1963 and resulted in a judgment against appellants and in favor of appellee in the aggregate amount of $50,000. This judgment was reversed for a new trial by the Arizona Supreme Court in an opinion by a divided court reported in 103 Ariz. 582, 447 P.2d 840. That opinion is reproduced in Appendix. This appeal is from the proceedings on the retrial of the claim.

The Notice of Appeal to the United States Supreme Court from the Superior Court order was filed in the office of the Superior Court Clerk on November 19, 1971 and the Notice of Appeal from the Arizona Supreme Court order refusing review of this order was filed in the office of the Clerk of the Arizona Supreme Court on November 19, 1971. The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C 1257(2). Alternatively, should the Supreme Court consider Section 1257(2) not applicable, the appellants rely upon 28 U.S.C. 1257(3) as conferring jurisdiction on the Supreme Court, treating this Statement as a Petition for Certiorari.

This appeal is from a "final judgment" within the meaning of 28 U.S.C.A. Sec. 1257 for the following reasons:

The claim was first tried to a jury in 1963, and resulted in a jury verdict against appellants for $30,000 actual damages and $20,000 punitive damages. Prior to the time for filing appellants' Reply Brief and for oral argument on the appeal from the judgment entered on this verdict, *Times v. Sullivan*, 376 U.S. 254 was decided and the Arizona Supreme Court had that decision before it and considered it (together with the later holdings of this Court) in reaching its decision on this first appeal. Despite the teaching of that decision and following

cases the court concluded by a 3-2 decision that the evidence was adequate to meet First Amendment standards, *Phoenix Newspapers v. Church*, 103 Ariz. 582, 447 P.2d 840, but sent the case back to the trial court for a new trial because of erroneous instructions. Two judges disagreed with the majority.

Justice Bernstein thought the evidence wholly inadequate to meet the First Amendment standards and would have dismissed the claim. Justice Udall concluded that the editorial was ". . . reasonably susceptible of an innocent, as well as libelous consideration . . ." and to be "reasonably susceptible of more than one meaning . . ." and, hence, that the jury should have passed on the editorial as libelous *per se* or *per quod*. Justice Struckmeyer specially concurred in the court's opinion written by Justice Lorna Lockwood holding the evidence sufficient to support a finding of "actual malice."

On retrial the Superior Court again refused to direct a verdict for defendants (appellants), and after a jury verdict aggregating $485,000 against the defendants and the entry of judgment thereon, the trial judge refused to grant appellants' Motion for Judgment n.o.v.

Appellants then petitioned the Arizona Supreme Court by a Petition for a Special Action[1] to review the action

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[1]Rules of Procedure for Special Action were adopted by the Arizona Supreme Court effective January 1, 1970. The "special action" takes the place of extraordinary writs and is designed to allow the appellate courts to review and correct abuses of discretionary powers, failure to exercise discretion, excess of jurisdiction and arbitrary or capricious actions or abuse of discretion. (Rule 3, p. 278, Vol. 17 A.R.S. 1971, 1972 Cum. Pocket Part) Illustratively, in *Dollar-A-Day-Rent-A-Car v. Superior Court*, 107 Ariz. 87, 482 P.2d 454 (1971), the Arizona Supreme Court reviewed and overturned the refusal of a trial judge to permit a plaintiff to amend its complaint and bring in an additional party defendant. The petition may be filed in "any" appellate court but if the action might have been

of the trial court in failing to judicially appraise the evidence and in abusing its discretion in refusing to dismiss appellee's claim or grant judgment in favor of appellants because of failure of proof of actual malice as required by the First Amendment.

This petition was based upon (a) the claim that Arizona Rules of Civil Procedure 50(a) and 50(b), as construed by the Arizona Supreme Court, contravene the First Amendment to the United States Constitution as explicated by *Times v. Sullivan* and its "progeny" by denying power to the trial judge to require proof of actual malice "with convincing clarity" and to dismiss the case (or render an appropriate judgment) upon finding the proof in a civil libel damage action involving a claim by a public official against a newspaper publisher insufficient to meet *Times* standards;[2] and, (b) the claim that the evidence was in fact inadequate both as to falsity and as to "actual malice" and the Arizona Supreme Court therefore had the constitutional obligation to itself review the evidence and bring this litigation to a halt.

The thrust of the response of appellee and the only point presented on oral argument on the petition was that the "law of the case" was dispositive of appellants' petition for a reappraisal of the evidence by the Arizona

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brought at the trial level in the first instance the reasons for initiating proceeding at an appellate level are to be given. (Supreme Court Rules of Procedure for Special Actions, A.R.S. Vol. 17, Cum. Pocket Part 1971-1972, p. 275 et seq.)

[2]On a Motion for a Directed Verdict and on a Motion for Judgment n.o.v. the rule is the same.

City of Phoenix v. Brown (1960), 88 Ariz. 60, 352 P.2d 754; *Sturm v. Heim* (1954), 95 Ariz. 300, 389 P.2d 702. All testimony must be construed in the light most favorable to the party against whom the motion for a directed verdict is directed.

City of Tucson v. Sanderson (1969), 104 Ariz. 151, 449 P.2d 616. Evidence must be considered in the light most favorable to sustaining the jury's verdict on a Motion for Judgment n.o.v.

Supreme Court. The response also raised *pro forma* claims of the adequacy of remedy by appeal[3] and of failure to state why the proceeding was not initiated in the Court of Appeals—a lower appellate court.[4]

Under the Arizona doctrine of the "law of the case" as repeatedly stated by the Arizona Supreme Court, only the Arizona Supreme Court had the power to review its earlier holding rendered on a previous trial of the same case.[5]

Since the facts revealed on this retrial "are substantially the same as those considered on the preceding appeal," Supreme Court review of its former decision was therefore foreclosed to appellants and the Arizona Supreme Court refused to grant another review of the evidence.

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[3]The claim of adequacy of remedy by appeal is defeated by the rationale of *Times v. Sullivan* and *Rosenbloom v. Metromedia*, ... U.S. .....; 29 L.Ed.2d 296, 91 S.Ct. ..... (1971).

[4]The Rule permits the initiation of the action in any appellate court and only requires an explanation if the *trial court* is by-passed. This is illustrated by *Dollar-A-Day*, supra, 107 Ariz. 87, 482 P.2d 454 (1971), brought directly in the Arizona Supreme Court. Cf. Rule 8(b), Supreme Court Rules of Procedure for Special Actions, A.R.S. Vol. 17, Cum. Pocket Part 1971-1972, p. 283.

[5]"We also stated in clear and explicit language that the first decision has established the law of the case. That decision was binding on the litigants and *all courts of this state. Even this court is bound by its former decisions* in the same case except where we are convinced that we were *palpably in error* and the former decision results in manifest injustice." (Emphasis added) *Maricopa County Medical Society v. Blende*, 104 Ariz. 12, 448 P.2d 68, 70 (1968).

"Where applicable, *our decision on the prior appeal of this case is binding on this court on appeal*, because the facts revealed in the second trial are substantially the same as those considered on the preceding appeal." (Emphasis added) *Alires v. So.Pac. Co.*, 100 Ariz. 6, 409 P.2d 714.

Concededly, appellants have a right of appeal to the Arizona Supreme Court to review this question as well as for the purpose of asserting additional error vitiating the judgment.

Another reversal for a new trial only multiplies the "chilling effect" of this libel claim by adding to appellants' expense and harassment since the question of the sufficiency of the evidence to meet the *Times v. Sullivan* standards is, as a practical matter, foreclosed in *all* Arizona courts. Another reversal on non-federal grounds will simply put the case back on the judicial treadmill again for another futile attempt at a favorable defense verdict.

Appellants further suggest that this refusal of the Arizona state courts to recognize and give effect to the First Amendment right of appellants to be freed from the harassment of a libel damage action as soon as it becomes apparent that in fact the plaintiff has no valid claim for relief *constitutes and is a "final judgment" denying this substantive and important federal right of appellants.* The right to early relief from the "chilling effect" of pending libel litigation is, in itself, an important First Amendment right.

Appellants therefore respectfully assert that the "finality" requirement of Section 1257 to confer jurisdiction on this Court as explicated in *Mills v. Alabama,* 384 U.S. 214, has been met.

See also: *Mercantile National Bank v. Langdeau,* 371 U.S. 555; *Local No. 438 Construction and General Laborers Union v. Curry,* 371 U.S. 542; *Cohen v. Beneficial Ind. Loan Corp.,* 337 U.S. 541; *Pope v. Atlantic Coast Line Ry. Co.,* 345 U.S. 379. The case, insofar as these two important federal rights are at stake, is now "ripe for decision." *Appellants have nowhere else to go.*

Appellants also respectfully assert that the Superior Court order and judgment judged in reference to the Arizona Supreme Court's law of the case doctrine and its order refusing to again review the sufficiency of the "actual malice" evidence constitutes a "final judgment" rendered "by the highest Court of the state in which a decision could be had." *Powell v. Texas*, 392 U.S. 514; *Thompson v. City of Louisville*, 362 U.S. 199; *Canizio v. New York*, 327 U.S. 82; *Kentucky v. Powers*, 201 U.S. 1.

That a state court rule, not adjudicative in character is a "state statute," is determined by *Lathrop v. Donohue*, 367 U.S. 820, 824-827.

STATUTES INVOLVED

Rules 50(a) and 50(b), Arizona Rules of Civil Procedure are printed in the Appendix, pages 53 and 54, respectively.

QUESTIONS PRESENTED

I

Whether an Arizona state statute (civil procedural rule) which, as construed by the Arizona Supreme Court, denies to a state court trial judge in a civil libel damage action brought by a public official against a newspaper publisher and the author of an editorial claimed to be libelous, the power to require proof "with convincing clarity" of "actual malice" as required by the First Amendment to the United States Constitution contravenes the First and Fourteenth Amendments to the United States Constitution.

II

Whether a newspaper publisher and author of an editorial may be held liable to a State Attorney General for civil libel damages based upon their editorial opinion

published in a newspaper of statewide circulation that a proposal made by this public official at a labor convention amounted to the recommendation of a communist device or technique historically utilized by communists in infiltrating and seizing control of governments, when (a) a "people's council" was in fact historically such a communist device, and (b) the evidence of "knowing untruth" or "reckless disregard for the truth" consisted solely of the several admissions by the publisher and editorial writer that they did not believe the Attorney General was, in fact, a communist or fellow traveler.

III

Whether failure of an editorial writer and newspaper publisher who did not believe a public officer was a communist, to ascertain if he actually understood all of the implications of a public proposal made by him and personally truly believed in the proposal before vigorously attacking it as historically a communist device for infiltrating governments, can support a finding of falsity and "actual malice" with "convincing clarity" when, while the public officer denies he understood or intended it as a communist proposal, the author and publisher offer their sworn testimony that their sole purpose was to expose and destroy "a very dangerous idea," and there was undisputed testimony that, in fact, the "idea" was a commonly recognized communist technique and device routinely recognized as such by persons knowledgeable about communists.

IV

Whether proof that the publisher of a newspaper who alone on behalf of the newspaper management authorized the editorial complained of which stated the opinion that a public proposal made by the Attorney General

of the state amounted to the proposal of a communistic technique or device did not believe the Attorney General was in fact a communist or fellow traveler meets *Times v. Sullivan* standards as proof of actual malice as against the newspaper and its publisher when the publisher stated under oath .

(a) that he knew the idea proposed by the Attorney General had in fact historically been an idea advanced and implemented by communists; and

(b) that he considered the author of the editorial one of the most knowledgeable men concerning communism he knew; that he had complete confidence in his knowledge of communism and relied upon this expertise in authorizing publication of the editorial.

STATEMENT

Appellant, Michael Padev, was born in 1915 in Bulgaria and grew to young manhood in that country where he entered the newspaper profession which has continued to hold his allegiance to this date.

As a young man Padev spent time in a concentration camp and fled Bulgaria prior to the communist takeover. He was tried and convicted "in absentia" by the communists because of his anti-communist writing. His elderly parents were imprisoned by the communists based on Padev's conviction "in absentia."

He continued his journalistic career in England and Europe and studied and wrote extensively on communism and communists. His acquaintance with communists and his contacts with communism have been close and continuous.

Eugene C. Pulliam publishes newspapers in Indiana and Arizona. As a young journalist in 1917-1919 he learned of numerous communist-sponsored "people's

councils" established from New York to California during this period. He traveled extensively after World War II and studied communism and its impact on people in the countries taken over by communists.

Pulliam met Padev in Germany, was impressed with his writing and knowledge of communism and employed Padev as Foreign Affairs Editor for the Arizona Republic. Padev came to Arizona in 1956. Pulliam considered Padev as one of the most knowledgeable men on communism he had known.

Padev first met Church in the spring of 1959 when they both participated in a panel discussion of American foreign policy. At the conclusion of the discussion Padev and Church visited. Padev was shocked at the views Church expressed praising economic democracy in Russia "because big capital doesn't control it."

Subsequently, during Church's campaign for election as Attorney General, Padev followed Church's public statements and speeches in which Church consistently attacked the legislature as venal, the "vested interests," i.e., the insurance and banking industries and the utilities, as greedy, grasping, and oppressive of the public, quite often, as Padev expressed it, "brutally."

Church addressed a labor union convention in Flagstaff, Arizona, on May 7, 1959. Padev first read of it in the Republic and Gazette (both Phoenix newspaper publications) and heard it over the radio.

The newspaper accounts highlighted the attack Church made on the legislature and the "vested interests" and the fact he proposed that labor should take the lead in the formation of "people's councils" to pressure the legislature and offset the evil influence of the "vested interests."

Padev was "shocked" and "scared" at the fact the Attorney General of the state would propose an idea which Padev believed to be a recommendation that Arizona labor sponsor a communistic device and technique for infiltrating governments and seizing political power.

After spending two to three days researching the literature on commuism he began writing the editorial in question of his own volition even though it was outside of his routine responsibilities as Foreign Affairs Editor.

He had finished the editorial and was preparing to submit it to Marquardt, Editor of the editorial page, when by chance he talked with Pulliam by phone. Pulliam agreed that the idea Church had proposed was very dangerous and must be exposed. He approved the editorial in principle because he had complete confidence in Padev and his knowledge of communism. The editorial was plainly identified as an "editorial," was titled "Communism and Mr. Church" and was run on the front page of the Arizona Republic. It is reproduced in the Appendix at pages 55 to 57.

The editorial at its outset identified as its subject "the dangerous left-wing ideas of Attorney General Wade Church" exemplified by "his proposal for the setting up of a 'people's council' in Arizona."

The editorial then discussed the assertions by the Arizona Attorney General that the Arizona Legislature was dominated by "special interests" and that Church proposed that labor cause the selection of "people's councils" run by labor to tell the legislature what to do.

The editorial then traced the history of the "people's council" idea as sponsored by communists and identified it as of communistic origin.

It concluded by asking if Church advocated socialism or communism in Arizona and stating that Church owed the people of Arizona an explanation as to just what he did recommend.

The evidence established without dispute or rebuttal by appellee from the literature which Padev produced and identified as the works of various writers he reviewed in writing his editorial and by the expert testimony of Padev and Ralph de Toledano that in fact Padev had read history accurately and had recited its findings truly in the editorial.

Both Padev and Pulliam testified that they did not intend a personal attack on Church; that their sole purpose was to expose and destroy a "dangerous idea." There was no testimony as to whether or not either Padev or Pulliam gave any thought to or discussed if Church in fact was a communist. Their only discussion as reflected by the record was with respect to the fact Church's proposal in their opinion was a dangerous proposal with a history of communist sponsorship.

Ralph de Toledano, a noted writer and commentator with long expertise in communism, for eleven years an editor of Newsweek and its expert on communism, testified—and there was no effort to disprove the testimony—that the use of the phrase "people's council", to one knowlegeable in communism is almost a phrase of art as referring to a communistic technique for infiltration of governments and seizing political power.

The Arizona Supreme Court, in its opinion in *Phoenix Newspapers v. Church*, supra, did not confine its examination of the record to the information before Padev when he wrote the editorial but reviewed the entire Church speech at Flagstaff which Padev had not read or seen when he wrote the editorial.

Church promptly sued appellants for libel and on the first trial the jury awarded Church a total of $50,000 as actual and punitive damages.

On appeal, the Arizona Supreme Court reversed for error in instructions but refused to direct a dismissal of the action. The Court considered the "actual malice" requirements of *Times v. Sullivan*, supra, (and following cases) and specifically ruled (by a divided court) that the fact Pulliam and Padev did not believe Church was in fact a communist was sufficient proof of "actual malice" to permit a jury submission.

HOW THE FEDERAL QUESTION WAS RAISED

The federal question was first raised in appellants' Reply Brief on the first appeal of this matter, on oral argument in the Supreme Court on that appeal and by appellants' Motion for Rehearing following the decision of the Arizona Supreme Court, Phoenix Newspapers v. Church, supra.

Prior to the retrial of the action in June, 1971, appellants amended their answer to specifically allege their First Amendment defenses.

Again by Motion for Directed Verdict at the close of plaintiff's case in chief and at the close of all evidence, appellants urged their defense of the failure of the evidence to meet the standard required by *Times* of proof of actual malice.

In their Motion for Judgment n.o.v. appellants again urged the obligation of the court to give effect to the First Amendment rights of appellants and the court's duty to independently evaluate the evidence.

> "*New York Times* makes 'actual malice' a constitutional issue to be decided in the first instance by the trial judge, by way of a motion for summary judgment or for a directed verdict, applying the *Times* test of actual malice or reckless disregard of the truth." P. 19, Motion for Judgment n.o.v.

> "Defendants (appellants) submit that, upon discharging its constitutional obligation to independently review this record, it will be abundantly clear to this Court that there was not sufficient evidence of either falsity or actual malice to warrant submission of those issues to the jury." "Conclusion," p. 28, Appellants' Motion for Judgment n.o.v.

Appellants' entire motion, 28 legal-size pages, was devoted exclusively to argument and citation of and from the cases, *Times v. Sullivan*, and "its progeny."

Appellants' "Special Action" Petition to the Arizona Supreme Court in Paragraph VII specifically challenged Rules 50(a) and 50(b), Arizona Rules of Civil Procedure, as construed by the Arizona Supreme Court as contravening the "great freedoms" assured by the First Amendment to the Constitution of the United States by denial of power to the trial judge in a civil libel damage action involving freedom of speech and the press to enforce standards for proof of actual malice required by *Times v. Sullivan*.

The constitutional obligation of the Arizona Supreme Court to itself review the evidence at the earliest practical time and to halt unsupported civil libel damage actions by a public official against a newspaper publisher when the record disclosed the barrier to such claims raised by the First Amendment has not been surmounted by the evidence was urged on the court by Paragraphs IX and XI of the Petition.

THE QUESTIONS ARE SUBSTANTIAL

The protection which appellants have received from the Arizona courts from the "chilling effect" of litigation which plainly trespasses upon appellants' "great freedoms" assured to them by the First Amendment to the United States Constitution has left them quite benumbed.

Four separate appeals have been made to the Arizona courts for vindication of their right to freely speak and publish their views concerning a public proposal made by a public officer and four times the Arizona courts have refused or failed to heed the plain teaching of *Times v. Sullivan* and "its progeny."

The Arizona Supreme Court had the benefit of *Times v. Sullivan* and many of the important decisions of this Court which further explained the First Amendment guarantees and how the courts should guard these fundamental constitutional rights in reaching its decision and writing its opinion in 447 P.2d 840. Yet the Arizona Supreme Court, by arbitrarily assigning meaning to the editorial not found within its four corners and by recourse to the entire text of the Flagstaff speech of appellee, not available to appellants in the preparation of the editorial, found sufficient evidence of actual malice to satisfy *Times*.

One experienced and able Supreme Court Justice could not even find the editorial libelous *per se* and the other found that the evidence wholly failed to meet *Times* standards.

The appellants' Motion for Rehearing, predicated solely on the insufficiency of the evidence, was rejected by the Arizona Supreme Court.

The trial court, on retrial, routinely denied appellants' Motions for a Directed Verdict and for Judgment n.o.v. The Arizona Supreme Court refused to reconsider its former conclusion and declined to accept and consider appellants' Petition, limited to a prayer for another review of the sufficiency of the evidence to satisfy *Times'* standards.

The first opinion and decision of the Arizona Supreme Court, despite the conflicting views of the members of

the Court, now stands as an impenetrable barrier between appellants and recourse to their First Amendment freedoms.

The refusal by the Arizona courts to faithfully read and apply the various decisions of this Court has caused and is causing appellants a grave injustice.

The first trial of this action was held in 1963. The decision of the Arizona Supreme Court on the appeal was announced November 27, 1968 and appellants' Motion for Rehearing was denied December 24, 1968 (447 P.2d 840). The retrial was held June, 1971, 8 years after the first trial and 12 years from the date suit was filed.

The remedy by appeal under these circumstances is plainly inadequate particularly when it is recognized that appellants' federal rights are now foreclosed by the former opinion of the Arizona Supreme Court.

The refusal of the Arizona courts to read and apply the plain principles of *Times v. Sullivan* and related cases to the undisputed facts in this case is puzzling.

Appellants in the editorial expressed the opinion that the ideas of appellee were left-wing and that the idea he advocated in his speech at Flagstaff was an idea which had been previously espoused and recommended by communists. They further expressed their view that this same idea had been utilized by communists in seizing power in Russia and in Eastern Europe. And by way of giving body to the editorial a liberal sprinkling of the history of the use of the idea by communists was interlarded with severe criticism of the proposal.

What was false about the factual statement as to the proposal made by Church as understood and criticized by Padev?

Nothing. Appellee admitted that he employed the language attributed to him.

What was false as to the statement the idea had been previously advocated and utilized by communists?

Nothing. Appellants proved this to be a fact and this was not disputed by appellee.

The most that appellee can complain of is the claim that he didn't intend this proposal in that sense — he did not realize he was recommending a communistic technique with a long history of use by communists in seizing political power.

But appellants did not charge that Church really believed this or personally hoped to see his idea so employed for the editorial ends by suggesting that appellee should make his position clear to the people of Arizona.

The courts in the federal system have responded to the teaching of this Court by liberal resort to summary judgment procedures and to interlocutory appeals to the Courts of Appeal as permitted by 28 U.S.C. Section 1292(b). The Courts of Appeal, at least in several circuits, have spelled out the appropriate procedures for safeguarding the right of one claiming a First Amendment right of freedom of speech and of the press to an early judicial appraisal of the soundness of the plaintiff's claim for damages in order that the benumbing "chilling effect" on a free exercise of these rights by harassing and unjustified litigation be avoided.

The state court system, at least the Arizona state court system, has not demonstrated a similar sensitive understanding of and response to this Court's exposition of the various aspects of First Amendment freedom guarantees. State court litigants should not be so disadvantaged, particularly in this area of the "great freedoms."

The right to have a trial judge in the first instance independently evaluate the evidence and judicially determine if it meets the standards of proof required in

this area of sensitive constitutional rights is a valuable right. This judicial appraisal, if the right is to be fully explored, should include the appraisal of the witnesses as they testify if possible, for a cold record may not tell the story accurately.

It is submitted that the Arizona courts have wholly failed to understand and apply the pronouncements of this Court interpreting the guarantees of the First Amendment involving freedom of speech and the press to the very great harm and continuing injustice to appellants.

CONCLUSION

This appeal presents substantial issues affecting the free enjoyment of the "great freedoms" of speech and the press as guaranteed to appellants by the First and Fourteenth Amendments to the United States Constitution.

Probable jurisdiction should be noted.

Alternatively, should the Court conclude that jurisdiction is not conferred by Section 1257(2) then appellants respectfully pray that this Jurisdictional Statement be treated as a Petition for a Writ of Certiorari filed pursuant to Section 1257(3) and, considered as such, that a writ of certiorari issue to review the orders and judgments involved.

Respectfully submitted,

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IN THE SUPERIOR COURT OF THE STATE
OF ARIZONA IN AND FOR THE
COUNTY OF MARICOPA

WADE CHURCH, Plaintiff, vs. PHOENIX NEWPAPERS, INC., an Arizona corporation; EUGENE PULLIAM and MICHAEL PADEV, Defendants.	No. 107395 JUDGMENT

The above entitled and numbered cause came on regularly for trial on the 9th day of June, 1971, before the Honorable Warren L. McCarthy, Judge of the above entitled court, and the parties appeared by their respective counsel, and a jury, in accordance with the laws of the State of Arizona, was regularly empanelled and sworn to try said action, and witnesses on the part of the plaintiff and the defendants were sworn and examined, and documentary evidence was introduced by plaintiff and defendants; and after hearing the evidence, the arguments of counsel and instructions of the court, the jury retired to consider their verdict, and subsequently returned into court and the foreman announced that the jury had reached a verdict, and upon presentation to the court of a written form of verdict, the Clerk of the court read and announced that the jury, by its verdict, found for the plaintiff and against the defendants and assessed compensatory damages in the sum

of $250,000.00 and fixed plaintiff's punitive damages in the sum of $235,000.00, and the verdict was received and recorded and those jurors who signed the same replied that it was their verdict, and thereafter the verdict was filed with the Clerk of the Court, and by reason of the foregoing,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff, Wade Church, do have and recover judgment against the defendants, Phoenix Newspapers, Inc., Eugene C. Pulliam and Michael Padev, and each of them, in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) as and for plaintiff's compensatory damages, together with the sum of Two Hundred Thirty-five Thousand Dollars ($235,000.00) as and for exemplary and punitive damages assessed against the defendants, and each of them, being in the aggregate Four Hundred Eighty-five Thousand Dollars ($485,000.00), with legal interest thereon from the date of the execution hereof.

DONE IN OPEN COURT this 21st day of June, 1971.

/s/ Warren L. McCarthy
Warren L. McCarthy
Judge of The Superior Court

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

WADE CHURCH, Plaintiff, vs. PHOENIX NEWSPAPERS, INC., et al, Defendants.	No. 107395 ORDER DENYING DEFENDANTS' MOTIONS FOR NEW TRIAL AND JUDGMENT NOTWITHSTANDING THE VERDICT.

This cause came on to be heard on defendants' Motions for Judgment Notwithstanding the Verdict and for a New Trial, and the Court having heard the arguments of counsel, considered the briefs submitted and being fully advised,

IT IS ORDERED that defendants' Motions for Judgment Notwithstanding the Verdict and for a New Trial be, and the same are hereby denied.

DONE this 8 day of October, 1971.

WARREN L. McCARTHY

The Honorable
Warren McCarthy
Judge of the Superior Court

SUPREME COURT
STATE OF ARIZONA
PHOENIX 85007
November 17, 1971

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and MICHAEL PADEV, Petitioners, vs. WADE CHURCH, THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA and WARREN L. McCARTHY, as Judge thereof, Respondents.	Supreme Court No. 10660 Maricopa County No. 107395

The following action was taken by the Supreme Court of the State of Arizona on November 16, 1971 in regard to the above-entitled cause:

"ORDERED: The Court Declines to Accept Jurisdiction of the Petition for Special Action."

Justice Lorna E. Lockwood disqualified herself from any participation in this matter. Judge Eino M. Jacobson of the Court of Appeals — Division One was called to sit in her stead.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

103 Ariz. 582

PHOENIX NEWSPAPERS, INC., a corporation;
Eugene C. Pulliam and
Michael Padev, Appellants,

v.

Wade CHURCH, Appellee.

No. 8122.

Supreme Court of Arizona.

In Banc.

Nov. 27, 1968.

Rehearing Denied Dec. 24, 1968.

Gust, Rosenfeld & Divelbess, Snell & Wilmer, by Mark Wilmer, Phoenix, for appellants.

Leibson, Goldstein & Weeks, by Philip T. Goldstein, Phoenix, for appellee.

LOCKWOOD, Justice:

Appellee Wade Church was Attorney General of the State of Arizona at the time of the commencement of this suit for libel on May 11, 1959. His claim was based upon an alleged libelous editorial which appeared on the front page of the *Arizona Republic*, one of two daily newspapers published by appellant, Phoenix Newspapers, Inc. Appellant Eugene C. Pulliam was, and is, president and publisher of the corporate defendant; appellant Michael Padev was the author of the editorial by which appellee claims he was libeled.

The events preceding the publication of the editorial were the following:

On May 7, 1959, Mr. Church delivered a speech in

Flagstaff, Arizona to the delegates of an AFL-CIO convention. The speech was not given from a prepared text but rather from notes; it was tape recorded, later transcribed, and produced in court by the defendants. Some of the pertinent portions of that speech which appear in the record are as follows:

"* * * I want to talk to you a little bit tonight about why labor is in politics in Arizona. I think there is a number of reasons. I think the first reason is because management is dominating the political scene in this state, and they have dominated it since 1912.

* * * * * * *

"* * * I think the first problem with reference to politics is the legislative control. Do you know that this legislature is controlled lock, stock and barrel by a third house that is not even elected by the people? They have a representative in the Hotel Adams that coordinates the work of all the special interest groups and you can't get a bill through unless you get their okay, and I am talking about the mining groups, and the power groups, and the construction groups, and the finance groups, and the cattle groups. They are all coordinated, they have a regular *council*, and the astounding thing is that the legislation that is passed is passed and okayed by this group. * * *

> "We, the people, what do we have to say about it? * * * Nothing, absolutely nothing. * * * It just makes you wonder whether or not the fundamental structure of our democratic order here in this state is going under, and I believe it is unless we take steps to change that." (Emphasis ours.)

Mr. Church proceeded to cite certain problems which existed in the state, and noted, with regard to a need for equalization of educational opportunities, that

"* * * That bill [a property evaluation bill] was lob-

bied through the legislature by the representative of the railroad group, it was his job. This *council* selected him to whip that through the legislature, you know. I saw him, he told me. And it is his job now to see that there is a representative of this unseen government before every County Board of Supervisors to make sure there is not too much money given the schools * * *. But nevertheless there you have a piece of special legislation that demonstrates that our legislature is run by a third house with headquarters in the Hotel Adams. I think it is a disgrace and we are going to have to do something about it * * *". (Emphasis ours.)

He cited other problems which he thought should be solved by representative legislation and then stated:

"Now, the working people and the people's groups are going to have to do *the same thing*. We are going to have to build a *council*. We are going to have to have *full-time representatives* up there at that legislature. We are going to have to watch it carefully. The *P.T.A.* ought to have them. The *Council of Churches* ought to have them, the labor groups ought to have two or three and those teachers, they are the ones that got a lot of brains, doggone them, they should be out there, too. * * *.

* * * * * * *

"But the thing that worries me is this, that if we don't do it, Democracy as we conceive it and as our kids learn it in the schools, will no longer exist in this state. If we don't *match stride for stride* the careful painstaking job that these special interest groups do in presenting their viewpoints to the legislature, *ours and others*, if we don't match that with the *people's council*, we are dead as a dodo and Democracy dies with it. We will bury our Democratic Order. We can't afford any longer in this state to have these special interests running us. * * * If we don't do it, then our children are going to live in a very, very shabby world * * *. If the labor organizations don't spearhead this peoples's movement for a restoration of the basic

democratic principles that our forefathers fought for, no one will do it, and I think once you take the labor movement out of our current system, we are dead. We are dead. And any hope for *anything other than a totalitarian state* is dead with it. * * *" (Emphasis ours.)

The day following, a news report of the speech appeared in the *Arizona Republic* and in part stated:

"CHURCH FLAYS LEGISLATURE'S THIRD HOUSE

"FLAGSTAFF (Special) — Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.

"He urged organized labor to join churches, PTA's, minority groups, and others and hire fulltime personnel to match *lobbyists* with the mines, power groups, construction industry, finance interests, and cattle groups. * * *"

A similar news account was published in the *Phoenix Gazette:*

"LABOR URGED TO COMBAT 'THIRD HOUSE'

By Bruce Kipp, Gazette Staff Writer

"FLAGSTAFF, May 7 — Atty. Gen. Wade Church advocates the creation of a 'people's council' to offset the effects of a 'third house' of the legislature through which, he says, management dominates the lawmaking in Arizona.

* * * * * *

"Toting up a list of people's needs, which included his people's council and a second major newspaper for Phoenix, Church said 'if labor won't spearhead this movement, nobody will do it.'

* * * * * *

"We're going to do exactly what these boys are doing — hire our own representative to this people's council to counteract the lobbyists of the mines, rail-

roads, and utilities which, in turn, control the state. * * *"

Subsequently, on May 11, 1959 an editorial, prominently placed on the front page, rather than on the editorial pages, appeared in the *Arizona Republic*. This editorial, the subject of plaintiff's suit for libel, states the following:

"An Editorial

"COMMUNISM AND MR. CHURCH

"NOTHING ILLUSTRATES better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona.

"According to Church our legislature is 'dominated' by special interest groups operating from the Adams Hotel in Phoenix. For this reason the legislature does not reflect the will of the majority of the people, the attorney general argues. To 'correct' this situation Mr. Church proposes the selection of a 'people's council' which presumably, should tell the legislature what to do and how to do it. Mr. Church thinks that this 'people's council' should be organized and run by Arizona's labor unions.

"MR. CHURCH'S 'people's council' idea comes straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist movement. The same idea was the cornerstone of the philosophy of Lenin, the founder of the Soviet state. The same idea is the political basis of all Communist regimes all over the world. The story of communism in power is essentially a story of the 'people's council' idea of government put into practice.

"When the Russian Czarist government fell apart early in 1917, the Russian democratic parties, which enjoyed the overwhelming support of the Russian peo-

ple, formed democratically elected government organizations, including a central (federal) government responsible to an assembly (parliament).

"Later on the Russians elected a constituent assembly.

"In all these elected bodies the Communists had but a tiny and insignificant minority.

"But the Communists were not interested in votes — they never are. They were, as they are, interested in power alone.

"THE COMMUNIST PARTY, under Lenin, created its own 'people's councils' which functioned independently of the government just the way Wade Church wants the Arizona 'people's council' to function.

"These *Russian 'people's councils'* were supposed to consist of 'soldiers and sailors' and 'workers and peasants,' but were, in fact, dominated and manipulated by the Communists.

"It was these councils that played the most decisive role in the overthrow of the Russian national all-party government headed by the social democratic leader, Kerensky.

"It was these 'people's councils' that completed the destruction of the Russian 'bourgeois' (capitalist) state and imposed the Communist regime. The first Communist cabinet, headed by Lenin, was actually called a people's council of commissars. In Russian the word 'soviet' means 'council' and the Soviet government is quite properly called 'council government.'

"THE COMMUNISTS employed the same 'council' technique in East Europe, as well as in the Far East, including Red China. *People's councils*, at times called patriotic councils, national councils, anti-Fascist councils, democratic councils, peace councils, and so on, *were*

formed by the Communists everywhere with the sole purpose of 'guiding,' i. e. intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies, which were not, at the beginning, Communist controlled.

"The 'people's council' idea is only another name for the Communist technique of the seizure of power and for the Communist way of enabling a small minority to control and eventually to rule the huge majority.

"According to Communist theoreticians, from Marx and Lenin to Kruschev and Mao, only the 'advance guard' (the Communist leaders) of the 'working class' (the majority of the people) know how to intrepret the 'historical laws of development' of our society.

"This supposedly enables the Communist leaders to know best what's good for the rest of us.

"Communists believe that they have the right and the duty 'to guide' the masses of humanity along the 'correct road' leading to socialism. The Communist-controlled 'people's councils' do this 'guidance' work with regard to the state.

"*'THE PEOPLE'S COUNCIL' idea of Attorney General Church* is therefore nothing but a disguised Marxist idea of minority rule over the majority.

"We are certain that most Arizonans will resolutely reject Mr. Church's alarming conceptions of government.

"We also sincerely hope that the Arizona labor movement — at whose annual convention last week Mr. Church first voiced his 'people's council' proposals — will have the good sense to disassociate itself completely from such dangerous ideology, which can only do harm to the rank and file working man.

"BUT MR. CHURCH, himself, owes an urgent expla-

nation to the public. He has to state, publicly and clearly, whether or not his 'people's council' proposals are part and parcel of a general Marxist philosophy of government and of life.

"Does Mr. Church advocate socialism for Arizona?

"Does he advocate communism?

"Does he want 'people's councils' to take over our state government in the way they have taken over the governments of all the unhappy lands behind the Communist Iron Curtain?" (Emphasis ours.)

Plaintiff Church immediately filed his complaint for libel against Phoenix Newspapers, Inc., the publisher, Eugene Pulliam, and the editorial writer, Michael Padev, in the Superior Court for Maricopa County. On May 12, defendants published plaintiff's reply to the editorial rejecting the newspaper's "opinions and inferences expressed" regarding his talk. Defendants Pulliam and Phoenix Newspapers, Inc., after unsuccessful motions to dismiss the complaint, filed their answer thereto on May 29, 1961. Plaintiff thereafter was granted leave to amend his complaint, and it is upon the amended complaint, and the subsequent answers of all defendants, that issues were joined. The case came on for trial April 29, 1963, and after a lengthy trial the jury entered a verdict for plaintiff in the sum of $30,000 compensatory damages, and $20,000 punitive damages. From this verdict and judgment, and from orders denying defendants' motions to set aside the verdict and judgment, and motions for a new trial, defendants appeal. We shall hereafter refer to the parties as they were designated below, as plaintiff and defendants.

Although defendants make numerous assignments of error on this appeal, three principal issues emerge: (1) Whether the court before trial ruled correctly that the

editorial was libelous per se; (2) Whether the editorial was qualifiedly privileged, and if so, whether the editorial constituted fair comment; (3) Whether sufficient evidence was adduced to prove both falsity and actual malice. In the light of New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) we must also determine whether the verdict and judgment abridge unconstitutionally the freedoms guaranteed by the First Amendment to the United States Constitution.

1.

The first question to be decided is whether the trial court was correct in its ruling before the trial that the editorial was libelous per se. We agree that it was. Defendants vigorously contend that, at most, the editorial is susceptible to two meanings — one libelous, the other nonlibelous; that if anything, the editorial is libelous per quod and as such should have been submitted to the jury for a determination whether the editorial was actionably defamatory. Defendants assert that the editorial was a comment upon a political speech, that such comment was based upon true facts, and that while the editorial does state that the proposed "people's council" is a communist device, nevertheless, the idea, and not the plaintiff, was the subject of the attack, *ergo*, there is no charge that plaintiff has communist sympathies.

[1] The guideline to be followed in determining whether a publication is libelous in and of itself has been previously stated by this Court in Central Arizona Light & Power Co. v. Akers, 45 Ariz. 526, 46 P.2d 126 (1935). In that case it was held:

> In determining whether the [publication] is libelous *per se*, we look to the language alone. * * * Words that are libelous *per se* do not need an innuendo because they are libelous in and of themselves. 45 Ariz. at 536, 46 P.2d at 131 (1935).

And, in Phoenix Newspapers v. Choisser, 82 Ariz. 271, 312 P.2d 150 (1957), it was stated that "* * * the entire article must be considered as a whole. * * * This is true not only with reference to its exact language but in accordance with its sense and meaning under all the circumstances surrounding its publication."

A publication is libelous "if [it] tends to bring any person into disrepute, contempt or ridicule or — to impeach his honesty, integrity, virtue or reputation, and is false and defamatory." Phoenix Newspapers v. Choisser, 82 Ariz. 271, 275, 312 P.2d 150, 153 (1957). And see Broking v. Phoenix Newspapers, 76 Ariz. 334, 337, 264 P.2d 413, 415, 39 A.L.R.2d 1382 (1953).

[2] The trial court in the first instance examines the publication for its defamatory content, and "if the language charged to be libelous is unambiguous it is the function of the court to say whether it is libelous per se." Broking v. Phoenix Newspapers, supra, 76 Ariz. at 337, 264 P.2d at 415.

[3] Viewing the editorial as a whole, and keeping in mind that

> "What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest." Afro-American Publishing Co. v. Jaffe, 125 U.S. App.D.C. 70, 366 F.2d 649, 655 (1966),

and that

> "[T]he publication is to be measured, not so much by its effect when subjected to the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average reader." MacLeod v. Tribune Publishing Co., 52 Cal.2d 536, 547, 343 P.2d 36, 41 (1959),

we are convinced that the editorial is libelous on its face, i. e., *per se,* and that the trial court was correct in its

ruling.[1] Taking the editorial statement for what is actually is, it could not have any other effect than to cause injury to the reputation of a person in Wade Church's position,[2] for its charges that "Mr. Church's 'people's council' idea" is the political basis of all communist regimes and the "cornerstone of the philosophy of Lenin, the founder of the Soviet state," as well as coming "straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist movement." It then proceeds to explain in scholarly, clear and unmistakable language how communists employed the people's council technique (already described as "Mr. Church's 'people's council idea' ") for the purpose of " 'guiding' i.e., intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies" in the process of seizure of power by communists. It plainly states "*The people's council idea of Attorney General Church* is therefore

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[1] Defendants devote considerable space in their brief to the proposition that the plaintiff, for his failure to allege "special damages" has drawn a complaint which is insufficient as a matter of law and good pleading. The controversy still rages among commentators and courts as to the relative significance of the legal principles distinguishing libel per se from libel per quod [Compare Eldredge, "The Spurious Rule of Libel Per Quod," 79 Harv.L.Rev. 733 (1965/66), with Prosser, "More Libel Per Quod," 79. Harv.L.Rev. 1629 (1965/66); and see Hinkle v. Alexander, 244 Or. 267, 411 P.2d 829, 417 P.2d 586 (1966): "We are not so much concerned about which of the opposing rules has the actual support of a majority of the courts. Our prime concern is which rule is the better, more workable and less confusing. We conclude that the Restatement rule (§ 569 (1938)) is to be preferred and adhere to it." 244 Or. at 277, 417 P.2d at 589]. In this case, however, the defamatory meaning is within the editorial itself. See Cen. Ariz. L. & P. Co. v. Akers, 45 Ariz. 526, 46 P.2d 126 (1935).

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[2] Cepeda v. Cowles Magazines & Broadcasting Co., 328 F.2d 369 (9th Cir. 1964) aff'd., 392 F.2d 417 (9th Cir. 1968); Fairbanks Publ. Co. v. Pitka, 376 P.2d 190 (Alaska 1962).

nothing but a disguised Marxist idea of minority rule over the majority." (Emphasis added.)

[4] The apparently rhetorical questions at the end of the editorial ask plaintiff to state whether "*his* 'people's council'" proposal (already characterized as a communist device employing the technique of intimidation, blackmail and terrorism) is part and parcel of a *general* Marxist (i.e. communist) philosophy of government and life, and whether he advocates socialism or communism for Arizona, with a desire to have people's councils (characterized as "Mr. Church's" idea) take over the state government in the way they have taken over all unhappy lands behind the Communist Iron Curtain. The insinuation that "Mr. Church's idea" embodies and approves of communist methods of intimidation, blackmail and terror, is so apparent here as to leave no room for argument. "A person may be liable for what he insinuates as well as for what he says explicitly." Cameron v. Wernick, 251 A.C.A. 1025, 60 Cal.Rptr. 102, 104 (1967); MacLeod v. Tribune Publishing Co., supra, 52 Cal.2d at 547, 343 P.2d at 42 (1959). There is respectible, and persuasive authority for the proposition that to charge a person with communist sympathies, leanings, and sentiments, or that such person is a "fellow-traveler," constitutes libel *per se:*

> "Whatever the rule may have been when anti-communist sentiment was less crystalized than it is [Citations] it is now settled that a charge of membership in the Communist Party or communist affiliation or sympathy is libelous on its face." MacLeod v. Tribune Publishing Co., 52 Cal.2d at 546, 343 P.2d at 41. And see, 33 A.L.R.2d 1186, 1212 (1954) and cases collected therein.

The whole thrust of the editorial is to link inseparably Wade Church and the idea of a "people's council" to the

communist "people's council," thus charging him with espousing a communist doctrine involving intimidation, blackmail and terrorism. This is clearly no less than a charge of being in sympathy with communism in its lawless and violent aspects. The defamatory impression originally left in the minds of the readers of this editorial was thus reinforced by the series of questions at the conclusion of the editorial.

There is probably no quicker, more devestating means for bringing a man into public contempt and hate than to affix to him the label "communist," or to link him otherwise to sympathy with communist ideology in its violent aspects, and this was particularly so in 1959. It is absurd to assert that under such circumstances the editorial, as claimed by the defendants, merely attacked plaintiff's idea, and therefore was completely lacking in any accusation against plaintiff himself. It was basically a statement that plaintiff's attitude, expressed by his idea, was sympathetic with violent communist methods.

As was said in Afro-American Publishing Co. v. Jaffe, 125 U.S.App.D.C. 70, 366 F.2d 649 (1966):

> "Appellant contends that as a matter of law the article is not libelous since Mr. Stone did not flatly state that plaintiff was prejudiced, and because it is not a statement of fact about plaintiff's conduct but a statement of opinion about his attitude. *Where readers would understand a defamatory meaning liability cannot be avoided merely because the publication is cast in the form of an opinion, belief, insinuation or even question.* A statement about one's attitude is defamatory if it tends to lower him in the esteem of the community." 366 F.2d at 655 (1966) (Emphasis added.)

Defendants state that in 1959, it was not *unlawful* in Arizona to be a communist or a member of the Commu-

nist Party.[2] Though this is true from a purely legal point of view, our discussion hereafter of the issue of malice forecloses the relevance of this argument.

What we have so far stated does not, of course, foreclose the possibility that the judgment cannot stand in light of recent United States Supreme Court decisions dealing with the freedoms guaranteed by the First Amendment. Our inquiry will be directed, therefore, to an examination of the facts and proceedings of the case at bar "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that [such debate] may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964).

The First Amendment to the Constitution of the United States provides in part that "Congress shall make no law * * * abridging the freedom of speech, or * * * the press; * * *." The decision in Gitlow v. New York, 268 U.S. 652, 45 S.Ct. 625, 69 L.Ed. 1138 (1925) made the freedoms guaranteed by the First Amendment applicable to the states via the Due Process Clause of the Fourteenth Amendment. And since *Gitlow*, the permissible scope of state action in regulating these freedoms through legislation or otherwise has been greatly circumscribed by many decisions of the United States

[2] However, in 1961, the state legislature proscribed the Communist Party with regard to any rights or recognition as a political party in Arizona, by reason of its "dedication to the proposition that the present constitutional government of the United States, the governments of the several states, and the government of the state of Arizona and its political subdivisions ultimately must be brought to ruin by any available means, including resort to force and violence." A.R.S. § 16-205. Arizona Communist Control Act. (1961).

Supreme Court. Of controlling importance for the proper disposition of this appeal is the rule announced by the Court in the case of New York Times Co. v. Sullivan, supra. The Court held:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with *'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.*" 376 U.S. at 279-280, 84 S.Ct. at 726 (1964) (Emphasis added).

Following the announcement of the *Times* decision, commentators expressed divergent views as to which of the constitutional tests[4] the Court relied upon in reaching the *Times* result.[5] This matter in part was put to rest by the remarks of Justice William Brennan, Jr. in a paper delivered as the Alexander Meikeljohn Lecture at Brown University on April 14, 1965. The lecture, entitled "The Supreme Court and the Meikeljohn Interpretation of the First Amendment," 79 Harv.L.Rev. 1 (1965), in part stated:

> "[T]he Court examined history to discern the central meaning of the first amendment, and concluded that the meaning was revealed in Madison's statement 'that the censorial power is in the people over the Government and not in the Government over the people'." 79 Harv.L.Rev. 1, 15 (1965).

For Alexander Meikeljohn, the First Amendment and its

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[4] "Clear and present danger," (Schenck v. United States, 249 U.S. 47, 52, 39 S.Ct. 247, 63 L.Ed. 470 (1919)); "redeeming social value," (Roth v. United States, 354 U.S. 476, 484, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957)); or "balancing" (see Konigsberg v. State Bar, 366 U.S. 36, 81 S.Ct. 997, 6 L.Ed.2d 105 (1961)).

[5] See, e. g. Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Supreme Court Review 191 (Kurland ed.).

"central meaning" absolutely forbade *any* encroachment upon its freedoms from any quarter. Meikeljohn, The First Amendment Is An Absolute, 1961 Supreme Court Review 245. And, Justice Black, in a concurring opinion in the *Times* decision in which Justice Douglas joined, expressed a similar view:

> "I base my vote to reverse on the belief that the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power." 376 U.S. 254, 293, 84 S.Ct. 710, 733 (1964). And see Black, The Bill of Rights and the Federal Government in THE GREAT RIGHTS (Cahn ed. 1963).

The majority of the Court as yet do not subscribe to the absolutist philosophy, for as was stated by Justice Brennan further on in the Meikeljohn Lecture:

> "Note that the *New York Times* principle has an important qualification: it does not bar civil or criminal libel actions for false criticism of the official conduct of a public official if that criticism is made with knowledge of its falsity or in reckless disregard of whether it was false or not. *The underpinning of that qualification is the 'redeeming social value' test.*" 79 Harv.L.Rev. 1, 18-19 (1965) (Emphasis added.)

The 'redeeming social value' test (in the context of *Times*) implies that though a communication or publication may have been privileged when made or published, its privileged status is defeasible upon a showing that the publisher was motivated by actual malice—knowledge of falsity, or reckless disregard for whether that which spoken or published was false. Therefore, in order for a publication or utterance to retain its privileged status, it must, in the marketplace of ideas and opinions, be of redeeming social value.

This view is buttressed by the later opinion of the

Court in the case of Garrison v. Louisiana, 379 U.S. 64, at page 75, 85 S.Ct. 209, at page 216, 13 L.Ed.2d 125 (1964) where it is stated:

> "The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. [Citations] That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which '*are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.* * * *' Chaplinsky v. New Hampshire, 315 U.S. 568, 572 [62 S.Ct. 766, 86 L.Ed. 1031]. *Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" (Emphasis added.)

As a further elaboration upon the constitutional rule announced in *Times*, vis-a-vis "malice," the Court in Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) noted:

> "Its [New York Times] definition of 'actual malice' is not so restrictive that recovery is limited to situations where there is 'knowing falsehood' on the part of the publisher of false and defamatory matter.

> *'Reckless disregard' for the truth or falsity, measured by the conduct of the publisher,* will also expose him to liability for publishing false material which is injurious to reputation." 388 U.S. at 164, 87 S.Ct. at 1996. (Emphasis added.)

And, in summary, the Court has held in Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966).

> "[T]he most repulsive speech enjoys immunity provided it falls short of a *deliberate or reckless untruth.* But it must be emphasized that malicious libel enjoys no constitutional protection in any context." 383 U.S. 53, 63, 86 S.Ct. 657, 663 (1966). (Emphasis added.)

It is incumbent upon this Court to examine our cases dealing with libel of public officials to determine whether the standards announced therein square with the constitutional principles which bind this Court in the disposition of this appeal.

2.

[5, 6] The trial court, in addition to its ruling on the question of libel per se, found that the publication was a qualifiedly privileged communication, the occasion for its privileged status being plaintiff's public speech given at a time when plaintiff was Attorney General of this State. The rule of *Times* is a constitutional rule of privilege, and we are bound to meet its requirements. Our prior decisions regarding what circumstances constitute an occasion for such privilege require that publications about matters of public interest and concern are to be accorded wide latitude, and that only proof of *actual malice* and falsity will defeat the privilege and allow an award for damages. See Phoenix Newspapers v. Choisser, supra, 82 Ariz. at 277, 312 P.2d at 154; Broking v. Phoenix Newspapers, 76 Ariz. at 340, 264 P.2d at 416.

[7] The question arises whether the Arizona standard of "actual malice" meets foursquare the *Times* standard. We previously have held that "Malice cannot be inferred from an article published on a privileged occasion alone. * * * The malice which plaintiffs must establish is not legal malice or malice at law, but it must be actual malice, malice in fact, express malice". Phoenix Newspapers v. Choisser, 82 Ariz. at 278, 312 P.2d at 155.[6] The constitutional requirement forbids any presumption of malice, or inference of malice and makes it the burden of plaintiff to prove actual malice. New York Times v. Sullivan, 376 U.S. 254, 284, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We believe that our cases dealing with the question of malice and its substance clearly meet the rigid requirements of the *Times* Rule, and particularly the later decision in Garrison v. Louisana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) which held:

> "[O]nly those false statements made with the high degree of awareness of probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions." 379 U.S. at 74, 85 S.Ct. at 216 (1964).

3.

[8] The crucial, and dispositive determination to be made on this appeal is whether plaintiff at trial introduced evidence sufficient to submit to the jury the question of malice and falsity as defined by *Times* and the cases following thereafter. Moreover, that evidence must be of "convincing clarity" to satisfy the constitutional standard. *Times*, supra, 376 U.S. at 285-286, 84

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[6] This rule of malice was cited approvingly in New York Times v. Sullivan, 376 U.S. at 280, footnote 20, 84 S.Ct. 710.

S.Ct. 710. To prove actual malice[7] is indeed a heavy burden to be borne by the plaintiff here, and that is as it should be. Otherwise, the use of a libel suit as a means for stifling free debate and discussion of important matters of our times would be greatly increased, with the result that

> "The threat of being put to the defense of a lawsuit brought by a * * * public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, * *" Washington Post Co. v. Keogh, 125 U.S. App.D.C. 32, 365 F.2d 965, 968 (1966).

We are therefore in accord with the principle of privileged communication regarding a public official, even where the defamatory publication is false, but must also apply the proviso that it was not made "with knowledge of its falsity or in reckless disregard of whether it was false or not". New York Times v. Sullivan, supra. Since the jury by its verdict must have found that the editorial was made either with knowledge that it was false, or with reckless disregard of whether it was false, we examine the record to determine whether there was sufficient evidence to sustain such finding.

The evidence presented at the trial clearly disclosed that plaintiff was neither a communist nor sympathetic with communist theology or ideology. The overwhelming weight of the evidence adduced from both defendants'

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[7] It is of interest to note the view expressed by Justice Black regarding the "malice" requirement of *Times:*

> "'Malice' * * * is an elusive, abstract concept, hard to prove and hard to disprove. The requirement that malice be proved provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguards embodied in the First Amendment." (Black, concurring in *Times,* 376 U.S. at 293, 84 S.Ct. at 733.).

and plaintiff's witnesses demonstrated that to label plaintiff as a communist or impute to him ideologies which inclined to communism would be to utter a gross untruth.

The evidence introduced with regard to the inspiration for, the preparation, and the approval of, the editorial is illuminating on the question of malice. Plaintiff proceeded on the theory that the editorial demonstrated unequivocally a reckless disregard for fair and factual commentary respecting the speech delivered to the convention in Flagstaff on May 7. Defendant Padev, author of the editorial, testified that he did not hear the speech, and that he was not present in Flagstaff on May 7. He testified:

> "Q. Let me ask you this question, and I want it clearly understood between you and me what the import of it is, as pertaining to your obtaining information, the information that you obtained before you wrote this editorial, and for the purpose of writing this editorial was based upon the report, printed report, of your reporter in your newspaper and what you heard over the radio, am I right?
>
> "A. You are right.
>
> "Q. From no other source?
>
> "A. Two newspapers, not one.
>
> "Q. From no other source?
>
> "A. Yes, sir."

He testified that the phrase "people's council" was the basis for his editorial comment; that the idea of a people's council was a "very dangerous idea indeed". Quite obviously, the meaning Padev attributed to the phrase "people's council" was not the meaning intended by Church, and a cursory examination would have revealed the discrepancy.

Mr. Padev testified that he had not heard the speech. His further testimony appears as follows:

"Q. Prior to the time you wrote this editorial, did you suspect this man of being possessed with communistic inclinations?

"A. No, sir.

"Q. Have you since?

"A. No.

"Q. You don't today?

"A. No, I don't. I certainly don't, no.

"Q. You made no investigation to obtain the factual matters as printed in that editorial, except from what you heard?

"A. What investigation? I knew what I knew, which was, I think, enough about the council, the *communist council device.* And it was a fact that Mr. Church had made a speech and recommended a device which could have been, or could be, usually it is, used by the communists, and I attacked the idea." (Emphasis added).

Throughout his testimony defendant Padev insisted that it was not plaintiff Church he was attacking but "Mr. Church's idea of the people's council". He further testified that "there is nothing communistic about Mr. Church's ideas either" and that there was nothing communistic about Mr. Church's speech.

It is a matter of general knowledge, particularly among persons familiar with communist vocabulary, that many words and phrases in common usage by non-communists when used by communists, have a completely different connotation and meaning. See J. Edgar Hoover, Masters of Deceit (reference to communist use of "Aesopian language") 1957. Also, Harry and Bonaro Overstreet, The War Called Peace (chapor 9, "Speaking in Tongues") 1961. Defendant Padev testified to considerable first hand knowledge of communist procedures

and therefore was without doubt aware of these semantic differences. The newspaper reports, as well as plaintiff's actual speech clearly demonstrated the ordinary meaning of the phrase "people's council," particularly in view of Padev's testimony above.

An editor of the *Republic,* Frederick Marquardt, testified that it was his duty to approve all editorials before publication. He stated, however, that in this particular instance he did not approve the editorial before publication, did not read it before publication, but did know the general contents of the editorial and knew what the title was to be. To the question why he had not approved it, he replied that the defendant Pulliam, the publisher, had approved the editorial. The evidence developed that defendant Pulliam was out of Phoenix on the day of approval; that Pulliam had telephoned the offices of the *Republic,* for general purposes, and had talked with Padev about the proposed editorial. Pulliam did not have a copy of the proposed editorial nor is the evidence entirely clear that he knew precisely how it was phrased.

Defendant Pulliam testified that he had read the newspaper report of the Church speech in his own paper. He further stated that defendant Padev had telephoned him and called his attention to the phrase "people's council" which disturbed him (Pulliam) and that "there is probably nobody in America who understands communism like he (Padev) does".

Defendants Pulliam and Padev and the witness Marquardt all testified that they had no belief that plaintiff Church was a communist, and the witness Marquardt stated that he had no knowledge or belief that Church had any sympathy for the communistic philosophy.

Michael Padev was qualified as an expert on communism at trial. Much of his testimony was directed to how the "people's council" device was a convenient means for communists to take over non-communists governments. In the face of the evidence regarding plaintiff's actual speech, and the newspaper reports thereof which referred to "a people's council" in the clearly expressed meaning of a lobby group to offset the "excessive influence" being exerted on the legislature by other such groups, or "councils," Padev steadfastly asserted that the council proposed by Church could surely be the first step to communism in Arizona government. Padev was asked:

> "Q. You know that communism thrives on animosity and destruction of the enemy, and you knew, didn't you, that the editorial would destroy this man, didn't you?"

He replied:

> "A. I wasn't thinking of Mr. Church, I was thinking of Mr. Church's proposal, people's council.
>
> "Q. If you weren't thinking of Mr. Church, why did you say very first up there 'Communism and Mr. Church'?
>
> "A. That was taking the two facts together, communism, and the Church speech at Flagstaff on the other hand, and the editorial tried to discover what was the relationship between the two."

The defense proceeded on the theory that every statement of the editorial was true or substantially true. Padev again testified at length upon communist theory, the revolution in Russia, the great and abiding fear he had in a communist takeover in America, and the strong possibility that the people's council proposed by plaintiff would be the vehicle for communist domination of Arizona.

Padev revealed his true belief and state of mind in the following testimony:

"A. Well, the latest one which really made me write the editorial was the proposal, the people's council proposal, he set forth in his Flagstaff speech.

"Q. Why did you consider that left-wing?

"A. It is very left-wing, because, first he says this is a shabby world unless we correct it. This is awful, you know. *This is one of the most effective methods of left-wingers and of communists of attacking the free enterprise system.* You create the impression that everything is awful. He said shabby world, 'our children will live in a shabby world,' and things like that. It is very bad.

"Second, he says the legislature is controlled by the Adams Hotel. *Now, in Russia they used to say that the legislature was controlled by the — they used to call it the Astoria Hotel. That is where the bankers were going. In Marx, you will see he says the same thing, that it is controlled by the stock exchange. These are standard expressions, routine expressions, by people belonging to the left-wing who want to undermine the confidence which people have in their own legislature.* Now, if you say the legislature is run by the Adams Hotel — how many people can you put in the Adams Hotel—you don't believe in voting any more. It means that the legislature elected by the people is controlled by about ten people in the Adams Hotel. This is a very, very dangerous idea.

"Q. This is why you considered it dangerous?

"A. Yes, sir. Yes, sir, left-wing and dangerous." (Emphasis supplied.)[8]

[8] Plaintiff introduced into evidence the column of Claiborne Nuckolls published in the *Arizona Republic* on March 29, 1959. This piece of political commentary, set out below, expresses a position not unlike that advanced by plaintiff in his speech on May 7, 1959.

"THE STATE WE'RE IN
By Claiborne Nuckolls

"IF ANYONE doubts there exists a 'third house' of the Arizona Legislature that amounts almost to an invisible govern-

ment, such doubts would have been dissipated had they been able to watch the recent legislative session from the sidelines as this reporter did.

"It is a house composed of lobbyists and other representatives of special interests, for the most part selfish in their goals. Its influence on what the lawmakers did or did not do was perhaps stronger, more dominating than this observer has ever seen before, particularly in the state senate.

"What and who are the interests that comprises the 'third house'? First come the copper mines. And don't believe for a moment that the political power of the mining interests has waned.

"Unrelenting opposition of this group almost succeeded in blocking any kind of school finance legislation and did in fact, result in passage of a measure that falls far short of the type of bill that Governor Fannin wanted. That any kind of bill at all was passed I attribute to two things primarily: (1) the governor's refusal to be cowed by the mining spokesmen, and (2) the backing given him in the less copper-collared house of representatives.

"RANKING NEXT in importance as members of the 'third house' come the railroads, the utilities and the pipeline corporations. However, it is to the credit of the railroads and utilities that, so this column is informed by responsible sources, they finally saw the need for and went along with school aid legislation.

"Railroad lobbyists, however, did push through a law requiring the public to bear half the costs of installing safety signal devices at grade crossings, and the utilities nearly got through a bill requiring the state to pay costs of relocating utility facilities on highway rights of way when space occupied by these installations is needed for highway purposes.

"Some representatives of the insurance industry almost prevented passage of a bill permitting state highway patrolmen to retire at a younger age than now is allowed.

"This column is informed that the liquor industry was quite active in lobbying against certain phases of proposed stronger traffic control legislation, particularly as regards stiffer penalties and more certain and sure punishment for drunk driving.

* * *

"However, the influence of lobbyists was apparent in connection with virtually every major piece of legislation passed by the last legislative session.

"I am reminded of what Johnny Johnson, former representative from Parker, once said as he ran the gantlet of lobbyists after emerging from the house chamber:

" 'There's nothing wrong with the legislature except there's too many lobsters around here. Every time I come out of that door a dozen lobsters grab me and try to lobster me.' "

Clearly, this testimony could have been considered by the jury to be persuasive in determining whether the editorial was actuated by actual malice.

To the extent that Padev was qualified to testify as to communist theory, institutions, and devices, the factual basis of the statements of the editorial regarding those subjects may be accepted. Yet this could not necessarily overcome the knowledge of falsity of the statements of fact as applied to what the plaintiff proposed in his speech, as shown by the reportorial accounts immediately following it, and which both defendants Padev and Pulliam testified they had read before the editorial was published.

[9-11] Defendants complain of the trial court's refusal to give an instruction on the defense of fair comment. We agree this should have been done. "Fair comment" is a form of qualified privilege applied to publications of the news media. It is limited to discussions of matters which are of legitimate concern to the community as a whole because they materially affect the interests of all the community. See Prosser, Law of Torts, 3rd ed., § 110 (1964), and cases cited. Under the ruling in *Times*, it extends not only to expressions of opinion, but likewise to false statements of fact, unless made with "actual" malice, as defined in *Times*. If the jury finds such actual malice, the defense of fair comment is defeated:

> "Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. *Both defenses are of course defeasible if the public official proves actual malice, as was not done here.*" *Times*, 376 U.S. at 292, 84 S.Ct. at 732.

The questions at the conclusion of the article proved

to have the most significant impact upon plaintiff and doubtless had the same effect upon the reading public. During testimony of defendant Pulliam, the following occurred:

"Q. And you knew what the consequences of publication of that article would mean, didn't you? Didn't you know what consequences of that publication would mean?

"A. I don't know whether I knew what the consequences of any publication will be. I couldn't possibly expect to know what the consequences are.

"Q. You knew that you would get letters such as Mrs. Stanlis's letter, did you not, Mr. Pulliam?

"A. I didn't know whether we would get a single letter or not. How could I know?

"Q. Well, do you know what impact this made upon your reading public?

"A. No, I don't.

"Q. Well, let me read you what impact it made, printed by your own paper.

" 'Good Work' Exhibit No. 6

"EDITOR, THE ARIZONA REPUBLIC:

"I want to congratulate you on the fine job you are doing in exposing communists in government.

"I had heard Mr .Church on TV in the last campaign and must admit I was completely fooled. In fact, I actually went out and worked for the man.

"Prior to reading your editorial I had never heard of these 'people's councils'. I suggest you take the initiative in starting a recall at once.

"Keep up the good work."

* * *

"Q. And do you think any other people thought like she did?

"A. I don't know.

"You don't. Well, let me show you Exhibit No. 7 and ask you if that it not an expression of what impact this editorial made upon your reading public?

"A. Well, this is certainly a very fine defense of Mr. Church, and we printed it.

* * *

"Q. Let me show you Exhibit 8 for identification and ask you if that is another reader impact that you printed in your newspaper?

"A. Well, this letter says a lot of worse things about us than we ever said about Church."

Exhibits 7 and 8 are set out below.[9]

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[9] *Plaintiffs' Exhibit No. 7:*

"Ruined Breakfast

"Editor, The Arizona Republic:

I am a Republic subscriber, I also read The Republic.

"I like The Republic. I realize that it is an opinionated paper.

"I do not know Wade Church. The majority of the voters in this state do know something about him, however.

"The editorial attack on Wade Church on May 11 must have ruined thousands of breakfasts. I mean good Republican breakfasts. I, for one do not care to have my intelligence insulted before nine in the morning. God save the intelligence of poor Mr. Church.

"This front page fiasco smacks of your most junior editorial writer, reflecting a sorry animosity of his employer, turning out a scorcher, paying no attention to truth, logic, relevance, or good taste.

"Gentlemen, the day is past when the best way to smear a man is to scream, 'Communist!'

"The editorial was far out of character for The Republic. I remain a subscriber and a reader. Not a Communist."

Plaintiffs' Exhibit No. 8:

"Church Defended

"Editor, The Arizona Republic:

"So you are up to your old trick of destroying those who get in your way or expose your racket. Racket it is, and just as bad as any labor rackets that have been getting publicity.

"Big Business racketeering is not publicized, but is equally guilty. Wade Church is a fine man with a fine family. He would fight racketeering wherever he found it. Because he is courageous enough to expose the truth of the way our legislature works, he has laid himself wide open to your wrath.

"You do not like opposition. Your philosophy is 'rule or ruin.' Perhaps you have gone a bit too far this time. Let us hope so, for the good of the people of Arizona."

[12] This and other similar testimony appearing in the record, was relevant for the purpose of showing damages, and the jury could have concluded that plaintiff was entitled to punitive damages as a result of the publication.

The final point which must be discussed is the matter of the court's instructions to the jury on the substantive law applicable to the case.

After instructing the jury that the court had found the editorial to be libelous per se and qualifiedly privileged, the jury was instructed that in order for plaintiff to prevail, it must find the editorial was false and was actuated by actual malice. On the matter of falsity, the court properly instructed that:

> "* * * [I]t is not necessary that the editorial be literally true in every detail. If the editorial is substantially true so as to justify its gist and the reasonable inferences therefrom, or if the plaintiff does not establish by a preponderance of the evidence that the article and reasonable inferences therefrom is not substantially true, then your verdict must be for the defendants."

The instruction regarding malice, to which defendants object, is as follows:

> "Actual malice may be inferred from the wrongful motive in the publication of the matter, if such be shown, or may be inferred from the absence of proper caution or want of proper justification for the publication of the matter, if such be shown, lack of good faith, if such be shown, or wanton or reckless disregard of the truth in publicizing the matter in the publication, if such be shown."

[13] It seems obvious, from an examination of the proposed instructions on malice submitted by both plaintiff and defendant, that the trial court considered carefully the established legal basis for each instruction.

However, New York Times v. Sullivan, supra, was not decided until nearly a year after trial of this matter. Consequently, failure to apply the principles enunciated therein at the trial of this case is not an adverse reflection on the trial court. Nevertheless, it is clear that the United States Supreme Court has made application of the *New York Times* case retroactive, at least insofar as any cases pending in an appellate court from and after its issuance in March of 1964.

The definition of "actual" malice has been set forth, supra. And, in Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L. Ed.2d 597 (1966) the United States Supreme Court said:

> "It is clear that the jury instructions were improper. * * * The trial court * * * defined malice to include 'ill will, evil motive, intention to injure. * * *' This definition of malice is constitutionally insufficient where discussion of public affairs is concerned; * * *. * * * [W]e held in New York Times that a public official might be allowed the civil remedy only if he establishes that the utterance was *false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true.*" 383 U.S. at 83-84, 86 S.Ct. at 675.

Both plaintiff and defendants requested an instruction which included the elements of "spite or ill will", which were specifically rejected in *Rosenblatt*. Even if defendants might have been entitled, after the trial, but subsequent to the *Times* decision, to attack the trial court's instruction including "spite or ill will" as evidence of actual malice, defendants in their reply brief in this appeal specifically cite *Times*, supra, yet not only do they fail to attack the instruction on this basis, but merely attempt to refute testimony "evidencing ill will".

[14] Nevertheless, we are of the opinion that, measured by the rules in New York Times v. Sullivan, supra,

Rosenblatt v. Baer, supra, and Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), the trial court's instruction on "actual malice" was fatally defective in its direction that in the alternative it may be inferred by "wrongful motive in the publication of the matter * * * or may be inferred from the absence of proper caution, or want of proper justification * * * lack of good faith * * *." *New York Times* rules out "negligence in failing to discover misstatements" as constitutionally insufficient for a finding of actual malice. In St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Court held that lack of reasonable care in determining whether an asserted libel was false did not conform to the *New York Times* constitutional test of actual malice, nor could such lack be considered "reckless disregard" of whether the utterance was false or true. The instruction here that malice may be inferred from "absence of proper caution" is so close, if not synonymous with the phrase "lack of reasonable care," that it cannot meet the constitutional test flatly enunciated in *New York Times* above.

We therefore hold that: the court did not err in ruling the editorial was libelous per se, and in so instructing the jury, but that the instruction defining actual malice did not meet the required federal rule, and therefore requires that the case be reversed for a new trial.

Reversed and remanded with directions for further proceedings in accordance herewith.

McFARLAND, C. J., concurring.

STRUCKMEYER, Justice (specially concurring).

Since there are divergent opinions by the members of this Court as to the proper disposition of this case, I feel that it is desirable to briefly express the basis for my concurrence with Justice Lockwood.

The hard core of the editorial lies in these few sentences:

> "Nothing illustrates better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona. * * * THE COMMUNIST PARTY under Lenin created its own 'people's councils' which functioned * * * just the way Wade Church wants the Arizona 'people's council' to function. * * * People's councils * * * were formed with the sole purpose * * * of intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies * * * The 'people's council' idea is only another name for the Communist technique of the seizure of power * * *."

These statements charge, not as an expression of opinion but as a positive assertion of fact, that Church proposed creating a people's council in Arizona to function just the way the councils that the Communist Party set up under Lenin functioned, they being formed for the purpose of intimidating, blackmailing and terrorizing legislatures and that this is the means of the Communists' seizure of power. It can only be understood to mean that Church was advocating the seizure of power through unlawful acts in the same manner as did the Communists, thereby destroying the democratic government of Arizona. The rhetorical question, "Does he [Church] advocate Communism," having already been answered by the previous purportedly factual statements, does not ameliorate the serious nature of the charges but serves rather to drive home to the reader the conclusion that Church was indeed advocating Communism.

That parts of the editorial may be fairly susceptible of another or other interpretations, that is to say, are not libelous per se, does not detract from or exclude the clear charge that Church wished to operate in the same

way as the Communists, by intimidation, blackmail and terror.

> " 'It is further the law in this state and elsewhere that if the language charged to be libelous is unambiguous it is the function of the court to say whether it is libelous per se.' Broking v. Phoenix Newspapers, supra [76 Ariz. 334, 264 P.2d 415]." Phoenix Newspapers v. Choisser, 82 Ariz. 271, at 276, 312 P.2d 150, at 153.

Accordingly, it is my opinion that the trial court properly instructed the jury that the editorial was libelous per se.

The jury, under the instructions of the trial court, found actual malice, malice in fact. I do not think it can reasonably be argued that there is insufficient evidence to sustain the verdict in this respect. The author of the editorial, Michael Padev, gained his information about Church's speech from a newspaper report, which is deserving of being requoted in part since, I believe, it is determinative of the question.

> "CHURCH FLAYS LEGISLATURE'S 'THIRD HOUSE'
>
> "FLAGSTAFF (Special)—Atty. Gen. Wade Church last night called for a 'people's council' to offset the special interest 'third house' which rules Arizona from Hotel Adams.
>
> "He urged organized labor to join churches, PTAs, minority groups, and others and hire full-time personnel to match lobbyists with the mines, power group, construction industry, finance interests, and cattle groups."

The newspaper account points out that what Wade Church meant by his use of the phrase "people's council" was to "hire full-time personnel to match lobbyists" with other interests. In representative government, lobbying is a lawful and accepted procedure for communicating the wishes of the electorate to the membership of legislatures. No stretch of the imagination can equate this

democratic process with the Communist technique for the seizure of power through intimidation, blackmail and terror. The editorial is not only false but the jury could have concluded that Padev must have known it was false. From knowledgeable falsity or a reckless disregard of whether it was false, there can be inferred malice. New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262; Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248; Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094, reh. denied 389 U.S. 889, 88 S.Ct. 11, 13, 19 L.Ed.2d 197, 198; Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456; Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597; Henry v. Collins, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892; Garrison v. State of Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125. See for example the statement in Curtis Publishing Co. v. Butts, supra, 388 U.S. 130 at 153, 87 S.Ct. at 1991:

> "That is to say, such officials were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity."

The court instructed the jury, at the appellant's request, on the issue of malice as follows:

> "Now, as previously stated, in order for plaintiff to be entitled to recover in this case, he must prove by a preponderance of the evidence not only that the editorial and any reasonable inferences therefrom complained of was false, but also that the defendants were actuated or motivated by actual malice in publishing it.
>
> "In this connection, you are instructed that to establish actual malice, you must find that the publication was wrongfully and intentionally published with spite

or ill will towards the plaintiff, and with a desire to injure him. Mere negligence or carelessness alone is not sufficient."

The instruction does not conform to the subsequent ruling of the United States Supreme Court in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686, adhered to and quoted with approval in the numerous cases since. See cases sited supra. The present interpretation of the First Amendment requires that a publication of and concerning a public official be false, and made either with the knowledge that it was false or with reckless disregard as to whether it was false.

The appellants' requested instruction was a correct exposition of the law as it then existed in Arizona. Phoenix Newspapers v. Choisser, supra; Broking v. Phoenix Newspapers, supra. Our invariable rule forbids that a litigant complain of his own requested instructions. We will not permit a party to lead the trial court into error. However, it is apparent that appellants, in good faith, attempted to apprise the trial court of the law in Arizona. This was their responsibility. They should not be charged with clairvoyance in not anticipating the course of the decision in New York Times v. Sullivan, supra. The decision in that case was announced March 9, 1964. Appellants' opening brief was filed in this Court on April 20, 1964, and, while no reference was there made to the Times decision, the reply brief discussed it in detail. Further, counsel subsequently devoted the principal portion of his oral argument to the question of malice as it related to the Times decision. Accordingly, I am of the view that appellants timely raised the constitutional issue and this Court must give it the recognition that the Supreme Court of the United States did in Curtis Publishing Co. v. Butts, supra, and Rosenblatt v. Baer, supra.

The quoted instruction has been specifically con-

demned in Rosenblatt v. Baer wherein the United States Supreme Court stated:

> "* * * it is clear that the jury instructions were improper. * * * The trial court * * * defined malice to include 'ill will, evil motive, intention to injure. * * *' This definition of malice in constitutionally insufficient where discussion of public affairs is concerned; * * *." 383 U.S. 75 at pp. 83, 84, 86 S.Ct. 669, at p. 675.

But were this Court to consider that the appellants could not question their own requested instruction, we would still be compelled to find reversible error in the light of the appellee's requested instruction also given by the court as discussed by Justice Lockwood.

Appellants raise two further matters which should be briefly considered in order that this case be correctly disposed of on retrial. First, appellants pleaded the defense of fair comment. They urge that this is a complete defense to the action and complain that the trial court refused to give their instruction embodying fair comment. In New York Times v. Sullivan, supra, it was recognized that the defense of fair comment is defeasible if actual malice is established. (See footnote 33.)

But the failure to give an instruction on fair comment is, in my opinion, clearly reversible error. There are certain statements in the editorial which are obviously comment. The jury should be instructed alternatively that the appellants are entitled to comment fairly upon any factual statements made without actual malice but as to any comments which are derived from or follow from knowingly false statements, or statements made in reckless disregard of whether they are true or false, the defense of fair comment does not apply.

Second, appellants complain of the introduction of certain exhibits as evidence of malice. It is not necessary to

comment on each exhibit but sufficient to point out that evidence of aggravating circumstances is alway admissible to enhance punitive damages where tortious conduct is alleged. Lutfy v. R. D. Roper & Sons Motor Co., 57 Ariz. 495, 115 P.2d 161. On retrial, such of the appellee's evidence as shows aggravating circumstances should be admitted for consideration by the jury limited by a cautionary instruction that such evidence is admitted only for the purpose of establishing or enhancing punitive damages.

Because of the lack of adequate instructions on malice and fair comment, I am of the opinion the case must be reversed for retrial.

UDALL, Vice Chief Justice (concurring in part and dissenting in part):

I specially concur with the opinion of the majority that the judgment of the trial court should be reversed and the cause remanded with directions for further proceedings as indicated in the majority opinion.

I disagree, however, with the conclusion reached by the majority that the trial court was correct in finding the editorial libelous per se. The defendants contend that the editorial is susceptible to two meanings; one libelous, the other nonlibelous, and that — if anything — the editorial is libelous per quod and as such should have been submitted to a jury for determination. I find myself in agreement with this contention and therefore dissent from the opinion of the majority that the editorial was libelous per se.

In the editorial it is stated that the plaintiff had advanced the idea of a People's Council in Arizona to counteract the domination of special interest groups that are organized to control the legislature. The editorial quotes the plaintiff as follows:

> "According to Church our legislature is 'dominated' by special interest groups operating from the Adams Hotel in Phoenix. For this reason the legislature does not reflect the will of the majority of the people, the attorney general argues. To 'correct' this situation Mr. Church proposes the selection of a 'people's council' which presumably, should tell the legislature what to do and how to do it. Mr. Church thinks that this 'people's council' should be organized and run by Arizona's labor unions."

Thus, a reader of the editorial is put on notice in the very beginning that even though the editorial repeatedly uses the word "Communism" in connection with the People's Council, it is to be operated by an Arizona labor union. There is also more than a suggestion that the word "Socialism", a non-offensive appellation, has a prominent part in the editorial; for instance, the expression: "Mr. Church's 'People's Council' idea comes straight from the writings of Karl Marx, the God of scientific Socialism and the prophet of the International Communist movement." Again, at the close of the editorial the question is asked: "Does Mr. Church advocate Socialism for Arizona?" "Does he advocate Communism?"

The issues are further confused by the statement in the editorial that the "People's Council" idea was called various names: for instance, the first cabinet headed by Lenin was called "People's Council of Commissars." The Communists later used the same "Council" technique in East Europe, as well as in the Far East, including Red China, and the "People's Council" idea was called by different names, such as, "Patriotic Councils", "National Councils", "Anti-Fascist Councils"; "Democratic Councils", "Peace Councils", etc. The various names used to describe the "People's Council" seem to dilute the poison of the term as applied to Communism.

The majority opinion quotes the following language from Phoenix Newspapers v. Choisser, supra:

> "* * * the entire article must be considered as a whole. * * * This is true not only with reference to its exact language but in accordance with its sense and meaning under all the circumstances surrounding its publication."

And from Afro-American Publishing Co. v. Jaffe, supra, it quotes:

> "What counts is not the painstaking parsing of a scholar in his study, but how the newspaper article is viewed through the eyes of a reader of average interest".

Then in the following paragraphs certain excerpts from the article are considered which, if read alone, would give the impression the author of the editorial was attempting to charge that Mr. Church was advocating the seizure of political power in the same manner as that used by the Communists. The editorial should, however, be taken as a whole and not confined to limited excerpts.

While the editorial does stress the idea of Communism, as it relates to "People's Council", still, a reader might conclude, since "Mr. Church thinks that this 'people's council' should be organized and run by Arizona labor unions' " it was only intended to apply to a socialistic organization that would adopt one of the milder designations in describing the "People's Council", such as, "Patriotic Council", "Democratic Council", or "Peace Council".

A publication is not actionable per se if it is reasonably susceptible of an innocent, as well as libelous consideration but is actionable in such case only upon proof of special damages.

> "To be defamatory per se the letter should be capable of but one meaning. 36 C.J. 1150. The words must be

of such character that the law will presume the person of whom they are written to have been damaged. Words having a doubtful meaning cannot be declared as a matter of law, to be actionable per se." Ruble v. Kirkwood (1928), 125 Or. 316, 266 P. 252, 254. See also Washington Post Co. v. Chaloner, 250 U.S. 290, 39 S.Ct. 448, 63 L.Ed. 987, 989; Becker v. Toulmin, 165 Ohio St. 549, 138 N.E.2d 391.

"A publication is actionable per se when the language used therein is susceptible of but one meaning, and than an opprobrious one." Gentry v. Wagoner County Publishing Co., Okl., 351 P.2d 718, 720.

If a written publication is reasonably susceptible of more than one meaning, it is for the jury to determine which of such meanings was attributed to the publication by the average reader, and it is error for the trial court to instruct the jury that such publication had but one meaning as a matter of law. Central Ariz. Lt. & Power Co. v. Akers, 45 Ariz. 526, 46 P.2d 126, 131. See also, Broking v. Phoenix Newspapers, Inc. 76 Ariz. 334, 264 P.2d 413, 415, 39 A.L.R.2d 1382.

Reading the entire editorial, the ordinary man might conclude the editor was trying to give a summary of the doctrines of Marxism and to show how these doctrines were incorporated into the philosophy of Communism, with a strong implication that Mr. Church may be advocating Marxism or Socialism. Or, the ordinary man reading the editorial could get the impression that the editor — in a subtle, pointed way — was trying to say that Mr. Church was advocating Communism.

For the reasons stated, I have a difficult time in agreeing with the majority that this confused discussion of Marxism, Socialism and Communism firmly establishes that the editorial is libelous per se. I believe the matter should have been submitted to a jury with proper instructions, leaving to the jury the responsibility of decid-

ing whether the allegations set forth in the editorial are libelous per se, or libelous per quod.

BERSTEIN, Justice (dissenting).

The Arizona law of libel involving public officials has been so limited by the United States Supreme Court in a series of decisions beginning with New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and continuing through St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), that we must look to these cases as a basis for our decisions.[1]

In New York Times, supra, the United State Supreme Court said:

> "We are required in this case to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."

The court further clarified its position in Rosenblatt v. Baer, 383 U.S. at 84, 86 S.Ct. at 675, when it said:

> "If existing state-law standards reflect the purposes of New York Times, this is at best accidental. Our decision in New York Times, moreover, draws its force from the constitutional protections afforded free expression. The standards that set the scope of its principles cannot therefore be such that 'the constitutional limits of free expression in the Nation would vary with state lines.' Pennekamp v. Florida, 328 U.S. 331, 335, [66 S.Ct. 1029, 1031, 90 L.Ed. 1295]."

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[1] N. Y. Times v. Sullivan, supra; Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964); Lin v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966); Rosenblatt v. Baer, 383 U.S. 75, 86 S.Ct. 669, 15 L.Ed.2d 597 (1966); Time, Inc. v. Hill, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 88 S.Ct. 197, 19 L.Ed.2d 248; St. Amant v. Thompson, supra.

The clear intent of the United States Supreme Court is to avoid the potentially inhibiting effects that libel actions have on free and open discussion.

The New York Times decision, 376 U.S., at 268, 84 S.Ct., at 719, contains the following language:

> "The question before us is whether the rule of liability, as applied to an action brought by a public official against critics of his official conduct, abridges the freedom of speech and of the press that is guaranteed by the First and Fourteenth Amendments."

and at 269-270, 84 S.Ct. at 720:

> "The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 [77 S.Ct. 1304, 1308, 1 L.Ed.2d 1498]. 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.' Stromberg v. California, 283 U.S. 359, 369 [51 S.Ct. 532, 536, 75 L.Ed. 1117]. '[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, Bridges v. California, 314 U.S. 252, 270 [62 S.Ct. 190, 197, 86 L.Ed. 192], and this opportunity is to be afforded for 'vigorous advocacy' no less than abstract discussion.' N.A.A.C.P. v. Button, 371 U.S. 415, 429 [83 S.Ct. 328, 9 L.Ed.2d 405]."
>
> "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked

upon it our all.' United States v. Associated Press, 52 F.Supp. 362, 372."

The men who founded our country were well versed in history, and they knew that tyranny allowed no opposition; free and open discussion has always been the great bulwark of liberty and democratic government. There is always danger in vociferous and often venomous debate; it is also a safety valve which allows pent up emotions to escape, reducing the threat of violence and insurrection which repression breeds. Thus, great men who fathered this nation also sought to protect its existence through the establishment of constitutional guarantees, and among others, the freedom of speech and press.

In the case before this court, Wade Church, who was Attorney General of Arizona, gave a speech before delegates to an AFL-CIO convention; the subject of his speech was vigorously attacked in a front page editorial, supra, printed by the Arizona Republic a prominent and influential Arizona daily newspaper. Mr. Church immediately filed suit for libel. I do not believe that libel of a public official can any longer be classified as libel per se in view of the United States Supreme Court decisions that:

"Injury to official reputation affords no more warrant for repressing speech that would otherwise be free than does factual error." New York Times v. Sullivan, 376 U.S. at 272, 84 S.Ct. at 722,

and

"* * * to insure the ascertainment and publication of publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones." St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1326.

Since World War II, the charge that someone is a communist has become so commonplace that rare is the man

active in public life who escapes it. Presidents of the United States, cabinet members and many of the most distinguished men in federal and state governments have fared no better. However, the consequences of imposing fear of punishment, whether by money judgments or incarceration, on free and open discussion would become the death knell of our system of government as we now know it; when hope, imagination and the right of dissent are stifled the freedom of men ends. The price is too high to pay for the protection of public officials against "* * * vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times v. Sullivan, 376 U.S. at 270, 84 S.Ct. at 721.

The New York Times decision, supra, at 273, 84 S.Ct. at 722, also quoted the following:

> "The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: 'Charges of gross incompetence, disregard of the public interest, communist sympathies and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent.' Noel, Defamation of Public Officers and Candidates, 49 Col.L.Rev. 875 (1949)."

As Attorney General, Mr. Church knew that his words were newsworthy and carried great weight. His speech calling for creation of "people's councils" and attacking everyone in sight, the newspapers, the legislature, the mining companies, public utilities, railroads, etc., was certainly not placid and virtually invited attack.

The speech surely was a matter of public concern and as the New York Times case said:

> "* * * 'public men, are, as it were, public property,' and 'discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.' " 376 U.S. at 268, 84 S.Ct. at 720.

In St. Amant v. Thompson, supra, the court said that in order for a public official to sustain a judgment in a defamation action the rule of New York Times must be correctly interpreted and applied, namely,

> "* * * that the plaintiff in such an action must prove that the defamatory publication 'was made *with actual malice*' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.'" (Emphasis added.)

Mr. Church had the burden of proving that the appellants did so act and he failed to carry that burden. The record shows that the appellants did not believe that Church was a communist or a communist sympathizer. Some testimony was presented that after admitted baiting by an agent of Church's one of the appellants said "We'll still finish your buddy Church." This statement is not such proof as is required of *actual malice*. It was an intemperate response, after deliberately arousing a man's anger, as to the political intent to vote Church out of office. It's the privilege of any American to support for election his friends and vote out people he dislikes for any reason.

The present standards for proving libel were clearly defined in the St. Amant decision, supra, wherein the court said:

> "Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In New York Times, supra, the plaintiff did not satisfy his burden because the record failed to show that the publisher *was aware of the likelihood* that he was *circulating false information*. In Garrison v. Louisiana, 379 U.S. 64, [85 S.Ct. 209, 13 L.Ed.2d 125] (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the *necessity* for a showing that a *false publication was made* with a '*high degree of awareness of* * * * *prob-*

> *able falsity.*' 379 U.S., at 74, 85 S.Ct. 216. Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 153, [87 S.Ct. 1975, 18 L.Ed.2d 1094] (1967), stated that evidence of *either deliberate falsification or reckless publication* 'despite the publisher's *awareness of probable falsity*' was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact *entertained serious doubts* as to the *truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.*" (Emphasis added.)

I do not find from the evidence that Mr. Church proved actual malice, that the editorial was either a deliberate falsification or a reckless publication or that the publishing was done with such doubts as to its truth, as to show reckless disregard for truth or falsity from which actual malice could be demonstrated. The editorial vigorously attacked the theme of Church's speech, the need to establish "people's councils."

The arena of politics is not for the thin skinned. As one of our former great Presidents, Harry S. Truman, said on politics "If you can't stand the heat, stay out of the kitchen."

The United State Supreme Court has repeatedly said that the national welfare demands open and robust debate, which includes the freedom of the press to question and attack the words and deeds of those who hold and those who aspire to high office.

Conflicting ideas, often diametrically opposed, are the seeds of a progressive democracy, and this must be a fundamental principle of our government. The dialogue of freedom, is more often than not, sharply divided. The

art of persuasion frequently invokes exaggeration, caustic commentary and vilification of prominent men. The false statement is not unknown. However, from this seeming turmoil our people have forged the greatest democracy history has ever known.

It is not libelous for a newspaper, in attacking a political speech made by a public official, to point out that said official has proposed a political contrivance (People's Councils) which historically had been utilized by the communists to seize power, and to editorially state that the speaker should clarify to the public his position on communism in advocating such a proposal. This constitutes fair comment under the First Amendment of the United States Constitution and does not impute that the public official is a communist or communist sympathizer. It is the right a newspaper has in free society, and does not libel Mr. Church.

For the foregoing reasons, I would reverse the trial court and dismiss the complaint.

RULE 50(a), Arizona Rules of Civil Procedure, A.R.S. Vol. 16

Rule 50. Motion for a directed verdict

50(a) When made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence, in event the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

RULE 50(b), Arizona Rules of Civil Procedure, A.R.S. Vol. 16

50(b) Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial. Amended March 26, 1963. Effective June 1, 1963.

"An Editorial

"COMMUNISM AND MR. CHURCH

"NOTHING ILLUSTRATES better the dangerous left-wing ideas of Attorney General Wade Church than his proposals for the setting up of a 'people's council' in Arizona.

"According to Church our legislature is 'dominated' by special interest groups operating from the Adams Hotel in Phoenix. For this reason the legislature does not reflect the will of the majority of the people, the attorney general argues. To 'correct' this situation Mr. Church proposes the selection of a 'people's council' which presumably, should tell the legislature what to do and how to do it. Mr. Church thinks that this 'people's council' should be organized and run by Arizona's labor unions.

"MR. CHURCH'S 'people's council' idea comes straight from the writings of Karl Marx, the god of 'scientific socialism' and the prophet of the international Communist movement. The same idea was the cornerstone of the philosophy of Lenin, the founder of the Soviet state. The same idea is the political basis of all Communist regimes all over the world. The story of communism in power is essentially a story of the 'people's Council' idea of government put into practice.

"When the Russian Czarist government fell apart early in 1917, the Russian democratic parties, which enjoyed the overwhelming support of the Russian people, formed democratically elected government organizations, including a central (federal) government responsible to an assembly (parliament).

"Later on the Russians elected a constituent assembly.

"In all these elected bodies the Communists had but a tiny and insignificant minority.

"But the Communists were not interested in votes — they never are. They were, as they are, interested in power alone.

"THE COMMUNIST PARTY, under Lenin, created its own 'people's councils,' which functioned independently of the government, just the way Wade Church wants the Arizona 'people's council' to function.

"These Russian 'people's councils' were supposed to consist of 'soldiers and sailors' and 'workers and peasants,' but were, in fact, dominated and manipulated by the Communists.

"It was these councils that played the most decisive role in the overthrow of the Russian National all-party government headed by the social democratic leader, Kerensky.

"It was these 'people's councils' that completed the destruction of the Russian 'bourgeois' (capitalist) state and imposed the Communist regime. The first Communist cabinet, headed by Lenin, was actually called a people's council of commissars. In Russian the word 'soviet' means 'council,' and the Soviet government is quite properly called 'council government.'

"THE COMMUNISTS employed the same 'council' technique in East Europe, as well as in the Far East, including Red China. People's councils, at times called patriotic councils, national councils, anti-Fascist councils, democratic councils, peace councils, and so on, were formed by the Communists everywhere with the sole purpose of 'guiding', i.e. intimidating, blackmailing, and terrorizing the elected parliaments and district assemblies, which were not, at the beginning, Communist controlled.

"The 'people's council' idea is only another name for the Communist technique of the seizure of power and

for the Communist way of enabling a small minority to control and eventually to rule the huge majority.

"According to Communist theoreticians, from Marx and Lenin to Krushchev and Mao, only the 'advance guard' (the Communist leaders) of the 'working class' (the majority of the people) know how to interpret the 'historical laws of development' of our society.

"This supposedly enables the Communist leaders to know best what's good for the rest of us.

"Communists believe that they have the right and the duty 'to guide' the masses of humanity along the 'correct road' leading to socialism. The Communist-controlled 'people's councils' do this 'guidance' work with regard to the state.

"THE 'PEOPLE'S COUNCIL' idea of Attorney General Church is therefore nothing but a disguised Marxist idea of minority rule over the majority.

"We are certain that most Arizonans will resolutely reject Mr. Church's alarming conceptions of government.

"We also sincerly hope that the Arizona labor movement — at whose annual convention last week Mr. Church first voiced his 'people's council' proposal — will have the good sense to disassociate itself completely from such dangerous ideology, which can only do harm to the rank and file working man.

"BUT MR. CHURCH, himself, owes an urgent explanation to the public. He has to state, publicly and clearly, whether or not his 'people's council' proposals are part and parcel of a general Marxist philosophy of government and of life.

"Does Mr. Church advocate socialism for Arizona?

"Does he advocate communism?

"Does he want 'people's councils' to take over our

state government in the way they have taken over the governments of all the unhappy lands behind the Communist Iron Curtain?"

SUPREME COURT, U. S.
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No. 71-838

In the Supreme Court of the United States

OCTOBER TERM, 1971

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM AND MICHAEL PADEV,
Appellants,

v.

WADE CHURCH,
Appellee.

On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

MOTION TO DISMISS OR AFFIRM

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On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

MOTION TO DISMISS OR AFFIRM

Appellee moves this Court to dismiss the appeal or alternatively to affirm the trial and post trial rulings of the Superior Court of Maricopa County, Arizona, and the order of the Arizona Supreme Court on the following grounds:

I. The appeal is not within the jurisdiction of this Court.

II. The appeal does not present a substantial federal question.

III. The questions truly raised are so insubstantial as to not require further argument.

I.

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THIS COURT

Appellants invoke jurisdiction of this Court under 28 U.S.C. § 1257 which grants jurisdiction of an appeal from a final judgment or decree:

> ". . .: where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellants' attempt to meet this requirement is contrived.

Appellants' real complaint is that the Arizona Superior Court (trial court) denied a trial motion for a directed verdict and a post-trial motion for judgment notwithstanding the verdict. To attempt to meet the quoted statute, Appellants assert that the refusal of the Arizona Supreme Court to review these rulings by a "Special Action," drew into question the constitutionality of two Arizona Rules of Civil Procedure which are in all pertinent respects identical to Rules 50(a) and 50(b) of the Federal Rules of Civil Procedure promulgated by this Court.[1]

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[1] Rule 50(a) of the Arizona Rules of Civil Procedure provides:

"A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence, in the event the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor."

Rule 50(b) of the Arizona Rules of Civil Procedure provides:

"Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not

Neither the Arizona Superior Court nor the Supreme Court of Arizona ruled on the constitutionality of these two procedural rules, nor was their constitutionality in any respect drawn into question..

The instant case in the Arizona Superior Court was the second trial of a libel action which the Arizona Supreme Court determined had to be retried[2] to give effect to the principles of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964).

When Appellants lost for the second time, they decided to short-circuit the appellate procedures of the Arizona courts and attempt a direct appeal from the trial court to this Court.

A direct appeal from the trial court to this Court, without more, would have been too obviously not an appeal from a "final judgment or decree."

To conceal this deficiency, Appellants resorted to a Special Action under the Arizona Rules of Procedure for Special Actions, which was certain to be denied out of hand.[3] This was done in

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returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

The "Historical Note" following both Arizona rules indicates their source as Rules 50(a) and 50(b) F.R.C.P. Rule 50(b) F.R.C.P. and Rule 50(b) A.R.C.P. are identical in language. Rule 50(a) F.R.C.P. and Rule 50(a) A.R.C.P. are likewise identical in language except that the Arizona rule omits the last sentence contained in Rule 50(a) F.R.C.P., to wit:

"The order of the court granting a motion for a directed verdict is effective without any assent of the jury."

[2] Phoenix Newspapers, Inc. et al v. Church, 103 Ariz. 582, 447 P.2d 840 (1968)

[3] The Arizona Supreme Court entered the following order appearing in 17 A.R.S. Anno. (Cumulative Pocket Part — West Publishing Co.):

spite of Appellants' right of appeal established by Title 12, Chapter 12, Article 1, of the Arizona Revised Statutes as amended Laws 1964.[4]

Appellants had every reason to be aware of the inapplicability of a Special Action to their situation. Rule 1 of the Arizona Rules of Procedure for Special Actions adopts the scope of relief traditionally granted under the historic writs of certiorari, mandamus and prohibition.[5] These traditional writs as applied in the State

"It is ordered that "Rules of Procedure for Special Actions — [Extraordinary Writs — Certiorari, Mandamus, Prohibition], hereto annexed, be, and it hereby is, promulgated to take effect on and after the 1st day of January, 1970."

[4] § 12-2101A A.R.S. provides that:

"An appeal may be taken to the Court of Appeals from the Superior Court in the instances specified in this section."

§ 12-2101C A.R.S. permits an appeal "from any special order made after final judgment." § 12-2101F, Sub. 1, permits an appeal "granting or refusing a new trial."

[5] Rule 1, captioned "Nature of the Special Action," provides:

"(a). Relief previously obtained against a body, officer, or person by writs of certiorari, mandamus, or prohibition in the trial or appellate courts shall be obtained in an action under this Rule, and any reference in any statute or rule to any of these writs, unless excepted in the next subsection, shall be deemed to refer to the special action authorized under this Rule. Special forms and proceedings for these writs are replaced by the special action provided by this Rule, and designation of the proceedings as certiorari, mandamus, or prohibition is neither necessary nor proper. Except as authorized by statute, the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal; and nothing in these rules shall be construed as enlarging the scope of the relief traditionally granted under the writs of certiorari, mandamus and prohibition.

"(b) Where a statute expressly authorizes proceedings under certiorari, mandamus, or prohibition, the proceedings shall be known as a statutory special action, as distinguished from those applications for writs of certiorari, mandamus, or prohibition, originating under A.R.S. §§ 12-2001, 12-2029, or the common law, which are special actions: Where a statutory special action is involved, the questions to be raised and considered are wholly unaffected by this Rule, but the provisions of this Rule as to parties, procedure, interlocutory orders and stays, and judgments shall apply."

of Arizona concern themselves with the "jurisdiction" of an inferior tribunal or administrative agency. The object of the writs was to prevent a (1) usurpation of jurisdiction or (2) an attemped assumption of jurisdiction where no such power or authority existed. *Sanford v. District of Pima County,* 8 Ariz. 256, 71 P. 906 (1903). *Peterson v. Jacobson,* 2 Ariz. App. 593, 411 P.2d 31 (1966). *Reid v. Ford,* 73 Ariz. 190, 239 P.2d 1079 (1952). *Hazard v. Superior Court,* 82 Ariz 211, 310 P.2d 830 (1957).

On January 1, 1970, the Arizona Supreme Court proposed to combine the traditional writs of certiorari, mandamus and prohibition into one proceeding to be known as "Special Action," eliminating confusion as to the proper lines of demarcation between the traditional writs.[6] Accordingly, the office of the new "Special Action," just as that of the traditional writs, is to test the propriety of a lower tribunal's exercise of jurisdiction. All that the Arizona Supreme Court determined on November 16, 1971, in its order declining to accept the petition for a Special Action was that the Superior Court of Maricopa County had "jurisdiction" over the parties, the subject matter, and that the trial court had the power to grant or deny the motions for a directed verdict and for judgment notwithstanding the verdict.

Most emphatically, the Arizona Supreme Court did not consider, and had no reason to consider, any question of whether or not the rules of procedure applicable to Appellants' motion were in violation of the Federal Constitution.

We are compelled to comment upon an assertion at Page 5 of

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[6] The State Bar Committee Note — 1969 — following Rule 1 for Special Actions in Arizona explains that:

> "This Rule proposes to combine the traditional writs of certiorari, mandamus and prohibition into one proceeding to be known as a 'special action.' The Rule is necessitated by the existing confusion as to the proper lines between these various writs, and by lack of a simple procedure which can be followed by all members of the bar and by the judiciary."

Appellants' Jurisdictional Statement. They say, as to the Special Action:

> "The thrust of the response of appellee *and the only point* presented on oral argument on the petition was that the 'law of case' was dispositive of appellants' position for a reappraisal of the evidence by the Arizona Supreme Court." (Emphasis supplied).

This statement, unsupported by any citation, is incorrect.

The written and oral thrust of Appellee's presentation before the Arizona Supreme Court was that (1) Appellants' writ could not supercede an appeal, and (2) the trial court had jurisdiction and the power to grant or deny Appellants' motions for directed verdict and for judgment notwithstanding the verdict.[7]

This Court has previously held jurisdiction lacking where a petitioner made a comparable attempt to short-circuit normal appellate procedures. In *Hammerstein v. Superior Court of California,* 341 U.S. 491, 71 S.Ct. 820 (1951), an appeal was attempted from the California Supreme Court's refusal to grant a Writ of Certiorari to review a default judgment entered by a California trial court. The California Supreme Court determined that the petitioner had failed to utilize the proper channels of review by not appealing from the judgment entered in the lower tribunal and that the California Supreme Court had no jurisdiction on certiorari.

This Court dismissed the appeal on grounds that no federal question was involved in the California determination.

In the case here at bar, this Court lacks jurisdiction for the further reason that the determination of the Arizona Supreme

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[7] Appellee's written response to Appellants' Special Action is a matter of record in this Court. Appellee in his oral presentation, as well as in his written response to the Arizona Supreme Court argued that (1) Appellants had an adequate remedy of appeal, (2) the office of a Special Action was limited to an appellate determination of whether the trial court had jurisdiction to pass upon Appellants' motions for directed verdict and judgment notwithstanding the verdict; and since such jurisdiction was present in the trial court, a Special Action would not lie.

Court was not a "final judgment or decree." This is a prerequisite to this Court's jurisdiction, whether by appeal or writ of certiorari under 28 U.S.C., Section 1257.

The determination of the Arizona Supreme Court clearly does not qualify as a "final judgment" as that term has been construed by this Court. In *Market Street Railway Co. v. Railroad Commission*, 324 U.S. 548, 65 S.Ct. 770 (1945) Reh. Den. 324 U.S. 890, 65 S.Ct. 1020, this Court said:

> "Final it must be in two senses: (1) it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court." (65 S.Ct. 773)

It is also to be noted that, in their haste to reach this Court, Appellants neglected the steps best calculated to obtain speedy appellate review on the merits. They delayed filing their Notice of Appeal to the Arizona Supreme Court to almost the last moment and made no effort to seek an expedited hearing.[8] Appel-

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[8] Arizona Supreme Court Rule 2 provides:

> "When a writ of certiorari is applied for under the provisions of A.R.S. § 23-951, the court may issue the writ commanding the industrial commission to certify its proceedings and make return thereof within ten days. The petitioner shall file his brief within twenty days of the return day and the respondent shall file the answering brief within twenty days thereafter. The petitioner shall have ten days after the filing of respondent's brief in which to reply. No enlargement of the time for such filings shall be granted any party except on written application to the court for good cause shown. The matter shall then be deemed submitted, unless either party requests oral argument, whereupon the proceedings shall be set for hearing at the next call of the calendar, and shall take precedence over all civil cases except matters of general public interest, election cases, and those involving or affecting the corporation commission."

In 5 Arizona Law Review 175 former Chief Justice Charles Bernstein of the Supreme Court of Arizona, in an article entitled "The Disposition of Civil Appeals in the Supreme Court," made the following comment at Page 185 thereof, regarding preference or advancement made pursuant to Rule 2:

> "Certain types of cases are advanced toward final disposition as a

lants' Notice of Appeal to the Arizona Supreme Court, to which Appellants make no reference, was filed in the Superior Court of Maricopa County on December 2, 1971.[9] Appellants omitted to place or discuss this Notice of Appeal in their Jurisdictional Statement.

The result of Appellants' procedural maneuverings is the paradox that the rulings of the trial judge are now pending appellate review in two courts of last resort.

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result of the rules of the Court. By Rule 16, criminal appeals are given precedence over all civil matters, and by Rule 2, Industrial Commission cases are automatically given precendence over most other types of civil cases. Rule 2 further indicates that civil cases of general public interest, election cases and those involving or affecting the Corporation Commission are to be given preference. Cases in these last-mentioned categories are not automatically placed at the head of the list, however, but are given precedence only upon motion of counsel. Such motions are considered and decided at the regular Tuesday conferences, and oral arguments on these motions are not generally permitted. The decision as to whether a particular case is of general public interest is based upon a showing that the decision will affect the interests of a substantial segment of our citizens. Occasionally a case will be advanced when circumstances of unusual hardship resulting from delay are shown."

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[9] On December 2, 1971, Appellants, in compliance with Rules 73(a) and (d) of the Arizona Rules of Civil Procedure, filed a Notice of Appeal to the Supreme Court of the State of Arizona and a Cost Bond on Appeal. The text of Appellants' Notice of Appeal is reproduced as follows:

"NOTICE is hereby given that PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and MICHAEL A. PADEV, the above-named appellants (defendants), appeal to the Supreme Court of the State of Arizona from the judgment entered in the above cause in favor of WADE CHURCH and against PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and MICHAEL PADEV, on the 21st day of June, 1971, in the sum of TWO HUNDRED FIFTY THOUSAND and no/100 DOLLARS ($250,000.00) actual damages, and the sum of TWO HUNDRED THIRTY FIVE THOUSAND and no/100 DOLLARS ($235,000.00), punitive damages, and *from the order denying appellants' Motion for a New Trial and Motion for Judgment Notwithstanding the Verdict*, entered October 8, 1971, and from the whole thereof." (Emphasis supplied).

II.

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

By short-circuiting the appellate procedures available in Arizona, Appellants bring to this Court a contrived and ridiculous challenge to the constitutionality of the rules of trial procedure prescribed by this Court.

At the same time, the question really troubling the Appellants — the application of *New York Times v. Sullivan* to the facts they claim were newly made of record at the retrial — would remain undetermined by any Arizona appellate court.

Appellants assert that the Arizona Supreme Court has refused to follow this Court's pronouncement in *New York Times v. Sullivan*, supra. The contrary is the fact. One need but scan the opinion in *Phoenix Newspapers, Inc. vs. Church*, set forth verbatim in the Appendix to Appellants' Jurisdictional Statement at Pages 5 to 52, inclusive, and particularly, Pages 18, 19, 20, 21, 22, 23, 24, 31, 35 and 36, to find the care with which the Arizona Supreme Court analyzed and applied the Times' opinion and the cases decided by this Court in its wake.

There is no reason to doubt that the Arizona Supreme Court, were this case permitted to pursue a conventional appellate course, would, with equal care, analyze and apply decisions subsequent to the *Times'* case to the facts presented during the second trial.

In the retrial, the trial judge was naturally bound by the law of the case established by the Arizona Supreme Court's first decision. As the Appellants concede (P.6) "only the Arizona Supreme Court had the power to review its early holding rendered on a previous trial of the same case."

This case can scarcely be regarded as presenting a substantial federal question when the only Arizona court which can rule on the issues involved has not had an opportunity to reappraise the

facts elicited at the second trial against the present state of the law.

III.

THE QUESTIONS TRULY RAISED ARE SO INSUBSTANTIAL AS TO NOT REQUIRE FURTHER ARGUMENT

The reasoning demonstrating the insubstantiality of any federal question similarly argues that, assuming jurisdiction, the order below should be affirmed without further argument. What is really appealed from is the determination of the Supreme Court of Arizona not to review the case by extraordinary writ, or "Special Action," but in the ordinary course of appellate review of civil proceedings.

Appellants' arguments addressed to the law of newspaper libel of public officials would seem beside the point until the merits of the case have received appellate consideration in the State of Arizona. The determination of the Arizona Supreme Court not to review them in a "Special Action" seems so unquestionably correct that no further argument seems to be required to justify its affirmation.

CONCLUSION

Appellants are not here on a "final judgment." No issue of constitutionality of a state statute is involved nor is any substantial federal question raised. Accordingly, this Court has no jurisdiction to entertain this appeal. In any event, the questions really raised are so insubstantial that if jurisdiction is assumed, the order below should be affirmed without further argument.

Respectfully submitted,

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In the Supreme Court of the United States

October Term, 1971

PHOENIX NEWSPAPERS, INC., EUGENE C. PULLIAM and MICHAEL PADEV,

Appellants,

v.

WADE CHURCH,

Appellee.

On Appeal From The Superior Court of the State of Arizona in and for the County of Maricopa and the Arizona Supreme Court

APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

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APPELLANTS' RESPONSE TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

I

Point 1 — That the appeal is "contrived."

Appellee states that the state courts did not rule on the constitutionality of Arizona Civil Rules of Procedure 50(a) and 50(b). We agree the trial court adhered to the long-accepted limitation upon the power of a trial judge in ruling on a Motion

for a Directed Verdict or for Judgment Notwithstanding the Verdict. We also agree that the Arizona Supreme Court refused to consider the claim that Rules 50(a) and 50(b) as construed by it contravened the First Amendment rights of appellants by denying to the trial court the right to make a judicial appraisal of the sufficiency of the evidence to determine if it met the *Times v. Sullivan,* 376 U.S. 254, standards upon its consideration of these motions in the trial court. The trial court had routinely denied the motions.

Contrary to appellee's assertions, the central purposes of appellants' Petition to the Arizona Supreme Court for a Special Action were (a) to seek a review of the failure of the trial court to apply *Times v. Sullivan* standards in ruling upon appellants' Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict because of the limitation upon its power imposed by Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure; and (b) (and most importantly) to squarely tender to the Arizona Supreme Court the question as to whether or not the Court might, because of the grave constitutional questions involved, make an exception to its self-imposed "law of the case" limitation restricting its power to reconsider a prior decision.[1]

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[1] Appellants' Petition for Special Action alleged:

"Rules 50(a) and 50(b) of the Arizona Rules of Civil Procedure as construed by this Court are applicable without exception to all civil jury trial proceedings including trial proceedings on a civil claim for libel involving rights of free press and free speech within the protection of the First Amendment to the Constitution of the United States. These Rules of Civil Procedure require a trial judge on the trial of such a libel action in ruling on a Motion for a Directed Verdict made on behalf of a defendant and in ruling on a defendant's Motion for Judgment Notwithstanding the Verdict to accept the evidence presented on the trial of the cause in the light most favorable to the plaintiff and to resolve all conflicts in the evidence in favor of the plaintiff and against the defendant. These rules further require such judge to draw all permissible inferences from the evidence in favor of supporting the claim of the plaintiff on a defendant's Motion for a Directed Verdict and Motion for Judgment Notwithstanding the Verdict and to deny said motions and each of them if there is any credible evidence which supports the claims of the plaintiff. In addition

(Continued on next page)

Appellee, in his Response to Appellants' Petition as filed in the Arizona Supreme Court made the contention that the special action procedure is not available because of the fact that an appeal is a remedy which is available. In support of this claim appellee cites only cases decided prior to the adoption of the Rules of Special Procedure on January 1, 1970, and cites no cases subsequent thereto.

As indicated in Appellants' Jurisdictional Statement, the Arizona Supreme Court has accepted and decided cases of far lesser moment than that which was presented through the Appellants' Petition for a Special Action.[2]

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thereto, the aforesaid Rules of Civil Procedure do not permit a trial judge to review the evidence independently of the jury and to judicially determine whether or not the evidence is sufficient to permit the claim of the plaintiff to be submitted to a jury or a judgment to be entered upon a verdict favorable to a plaintiff when challenged by a Motion for Judgment Notwithstanding the Verdict, to stand." (Appellants' Petition, pp. 3, 4)

Appellants presented their claims for relief in the Special Action Petition to the Arizona Supreme Court as follows:

"Petitioners respectfully assert that it is the obligation of this Court in the exercise of its supervisory jurisdiction over the trial courts of this state and in discharge of its obligation to enforce the provisions and requirements of the Constitution of the United States pursuant to the express direction of Article 2, Section 3 of the Arizona Constitution to review the action of the trial court of Maricopa County in this cause and to forthwith suspend and terminate further prosecution of the claims of the respondent Church and terminate the liability and obligation of said judgment to this Court." (Appellants' Petition, pp. 5, 6)

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[2] In *Dollar-A-Day-Rent-A-Car v. Superior Court,* 107 Ariz. 87; 482 P.2d 454, the Arizona Supreme Court reviewed by a special action the refusal of a trial judge to permit a plaintiff to amend the complaint and bring in an additional party defendant. Manifestly, a ready right of appeal was available under the circumstances. Since the Rules of Special Procedure are directly tailored to permit review of abuse of discretion and capricious action by the trial court, it seems hardly reasonable to contend that the Supreme Court would review a mere refusal to permit the amendment of a complaint and the bringing in of an additional party defendant and yet ignore the action of a trial judge which plainly disregarded important constitutional rights of a litigant.

Appellee's response to appellants' request that the Arizona Supreme Court review the trial evidence to ascertain if the litigation should continue was foreseeable.[3]

II

Point 2 — The Final Judgment Question.

Hammerstein v. Superior Court of California, 341 U.S. 491, relied upon by appellee is not controlling. *Hammerstein* involved the failure of the petitioner to appeal a default judgment which this Court recognized as not rising to the dignity of a final judgment because of this, since the default judgment terminated the action only because of the failure of the defendant to appeal. The Court did recognize that the constitutional questions involved by reason of the questions raised in the California court were subject

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[3] Appellee alleged:

"That the petition presents questions previously ruled upon in *Phoenix Newspapers, Inc. vs. Church,* 103 Ariz. 582, 447 P.2d 840 (1968) which constitutes the law of the case. (p. 1 of Response)

* * *

"In its opinion, this Court determined that: (1) the editorial was libelous per se; (2) the editorial was qualifiedly privileged, and (3) sufficient evidence was adduced to prove both 'falsity' and 'actual malice' within the definition of *New York Times vs. Sullivan,* 376 U.S. 254, 84 S.Ct. 719 (1964). * * * The petition at bar omits any reference to this Court's antecedent rulings in *Phoenix Newspapers, Inc. vs. Church* (supra). The reason for such omission is perspicuous. To have referred to this Court's previous rulings *would have a fortiori barred the present petition and this Court's consideration thereof on the basis of the doctrine of the law of the case.* (Emphasis added)

"At bar, petitioners were appellants and the Respondent Church was appellee in *Phoenix Newspapers, Inc. vs. Church* (supra). The rulings of this Court in *Phoenix Newspapers, Inc. vs. Church* (supra) *constitute the law of the case and cannot be presently questioned by petitioners' special action or in any subsequent appeal.* It is fundamental that a formal opinion by an Appellate Court on the merits of a case and the law stated therein is conclusive as the law of the case on a subsequent appeal or other appellate proceeding. See 9 Boston U. L. Review, 225 (1929), Lummus, "The Law of the Case in Massachusetts."

"The doctrine called 'law of the case' is firmly established in a long chain of Arizona decisions beginning with *Snyder vs. Pima County,* 6 Ariz. 41, 53 P. 6 (1898) and including *Alires vs. Southern Pacific Company,* 100 Ariz. 6, 409 P.2d 714 (1966). * * * " (pp. 7, 8 of Response)

to the jurisdiction of this Court, but the Court exercised its discretion and declined to consider them.

In *Cohen v. Beneficial Industrial Loan Corporation,* 337 U.S. 541, Justice Jackson speaking for this Court said in discussing "finality" as required to give this Court jurisdiction:

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete.
>
> * * *
>
> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. Bank of Columbia v. Sweeny, 1 Pet. (US) 567, 569, 7 L ed 265, 266; United States v. River Rouge Improv. Co., 269 US 411, 414, 70 L ed 339, 343, 46 S Ct 144; Cobbledick v. United States, 309 US 323, 328, 84 L ed 783, 786, 60 S Ct 540.
>
> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. * * * "
> 93 L.ed. at 1536

Appellee has not dealt with appellants' claim (p. 7 Jur. Stmt.) that the failure of the trial court to accept its responsibility of independently reviewing the evidence and protecting appellants' First Amendment rights against continuing legal harassment immediately it becomes clear that the plaintiff's claims run afoul of First Amendment guarantees and that the refusal by the Arizona Supreme Court to free appellants from the "chilling effect" of continued unwarranted legal harassment upon the opportunity becoming legally available to it to act upon appellants' claims of invasion of their First Amendment rights *constitutes a final denial of this independent constitutional right of appellants "separable from and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to*

require that appellate consideration be deferred until the whole case is adjudicated."

If, in fact, continuation of libel litigation after it clearly appears the evidence fails to meet standards as explicated in *Times* and following cases constitutes an invasion of First Amendment rights of a newspaper publisher, then appellants have indeed been finally denied protection for these rights by both the Arizona trial court and the Arizona Supreme Court.

If appellants had not sought relief in the Arizona Supreme Court from the arbitrary and capricious action of the trial judge in denying appellants a judicial review of the sufficiency of the evidence to meet First Amendment free speech — free press requirements by their Petition for Special Action, it might be properly claimed this important federal right had not been finally denied by the Arizona courts. Appellants did exhaust all avenues available to them in the state courts and have been rebuffed at both the trial and the highest appellate court level.

Under the Arizona court system litigants claiming First Amendment rights in civil libel damage litigation, as compared to similar litigants in the federal system, are "second class citizens" denied ready protection at the earliest practical date for their First Amendment rights. Cf. *Time, Inc. v. McLaney,* 406 F.2d 565, at 566 (5th Cir. 1969); *Thompson v. Evening Star Newspaper Company,* 394 F.2d 774, at 776 (D.C. Cir. 1968); *Washington Post Company v. Keogh,* 365 F.2d 965, at 968 (D.C. Cir. 1966).

Appellants concede that they did not believe appellee was a communist when the editorial complained of was written. The Arizona Supreme Court has determined that as a matter of law the editorial accused appellee of being a communist — a libelous *per se* publication. And the Arizona Court has concluded that the mere lack of a belief that appellee was a communist in vigorously attacking appellee's views constitutes "knowing falsehood or reckless disregard for the truth."

Appellants seek relief in this Court because they have been, as a practical matter, finally denied their constitutional rights of

free speech and free press in the state courts of Arizona at least in part. This is true because there is no substantial claim that the evidence on the second trial of this cause differed in any substantial degree from the evidence on the first trial which was reviewed and appraised by the Arizona Supreme Court on the appeal from the judgment following the first trial. (App. Jur. Stmt., p. 5). There is no contention that any new or additional evidence is available to appellants should this cause be reversed for a new trial by the Arizona Supreme Court.

As appellee points out (the relevance of the fact remains obscure) appellants have protected their right to appeal to the Arizona Supreme Court by filing a Notice of Appeal to that Court within the required time.

However, if this Court refuses to review appellants' rights at this point, what are the alternatives which confront appellants?

The Arizona Supreme Court has finally passed upon appellants' First Amendment claims — emphatically and adversely to appellants. If, therefore, after the appeal briefs are written and the appeal is argued the Arizona Supreme Court finds no state law error sufficient to require reversal and affirms the judgment, appellants can then again seek relief in this Court in vindication of their First Amendment rights, meanwhile bearing the "chilling" burden of a $500,000 libel damage judgment and the expense of an unnecessary appeal to the Arizona Supreme Court.

If, however, the Arizona Supreme Court finds state law reversible error on the appeal then appellants face the further dreary and hopeless task, under facts and law established through two trials of this cause and one appeal, of girding their loins for the state trial court fray again, faced with an effective bar of recourse to their only real defense, their First Amendment rights, by Arizona's "law of the case" rule. And then the inevitable appeal to the Arizona Supreme Court to be again confronted with the "law of the case" and effective exclusion from their only real defense, their First Amendment rights.

III

Point 3 — No Substantial Federal Question is Presented.

Apparently appellee agrees with the Arizona state courts that the First Amendment freedoms are not "great freedoms" and that this Court did not really mean what it said in *Times v. Sullivan,* supra, and *Rosenbloom v. Metromedia,* ..... U.S. ....., 29 L.Ed.2d 296, 91 S.Ct. ..... (1971) (among others) that unjustified civil libel damage litigation involving First Amendment rights constitutes a serious invasion of the constitutional rights of a newspaper publisher.

The United States District Courts and the United States Courts of Appeal have found the constitutional rights which appellants would vindicate by this appeal to be important federal rights. (See cases p. 6 ante). Certainly to this point appellants have been denied the First Amendment rights which the federal system has recognized and effectively protected through District Court and Courts of Appeal review of the evidence at "the earliest practical time" to make sure that these "great freedoms" of free speech and free press may flourish and that the "chilling effect" of continued litigation of unsupported libel claims be prevented.

At this point these same federal rights have been finally denied appellants.

The Motion of Appellee should be denied.

Probable jurisdiction should be noted or the appeal be treated as a Petition for a Writ of Certiorari and so treated, granted.

Respectfully submitted,

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